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James

CIVIL PROCEDURE REPORTS

CONTAINING CASES UNDER THE
CODE OF CIVIL PROCEDURE
THE GENERAL CIVIL PRACTICE
AND
GENERAL RULES OF COURT
OF THE
STATE OF NEW YORK

WITH NOTES BY
J. S. RUMSEY

VOLUME XXXIX.

NEW YORK
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NEW YORK

Civil Procedure Reports

SOLOMON TURCK, PLAINTIFF, *v.* STEWART H.
CHISHOLM, ET AL., DEFENDANTS.*

SUPREME COURT, SPECIAL TERM, NEW YORK COUNTY,
FEBRUARY, 1907.

§ 872, RULE 82.

Discovery—Examination Before Trial—Of Party Who Will Attend.

The right given to examine a party before trial, by Code Civil Procedure, Section 827, and Rule 82 of the General Rules of Practice, is absolute, and the right to an order is not defeated by showing that the parties sought to be examined are residents of the county, are amenable to service of process, and intend to be present at the trial, or that they are ignorant of the matters embraced in the order, or that the same information may be had from other persons.

(Decided February, 1907.)

Motion to vacate order for examination of defendants before trial. Denied.

Messrs. Meighan & Necarsulmer (S. Untermeyer, John A. Garver, and Henry Necarsulmer, of counsel), for plaintiff.

*Note.—Intended presence at trial as defense to examination before trial, see *Bender v. Bork*, 38 N. Y. Civ. Proc. R. 113.

Turck v. Chisholm et. al.

Messrs. Howland, Murray & Prentice (George W. Murray, of counsel), for D. O. Mills.

Mr. Harry R. Kohn, for M. J. O'Shaughnessy.

LEVENTRITT, J.—This action was brought to recover damages sustained by the plaintiff in the purchase by him of stock of the American Grass Twine Company, which purchase was induced by certain false representations alleged to have been made by the defendants. An order made for the examination before trial of two of the defendants, former directors of the company, is now sought to be vacated on many grounds. The alleged false representations were: (1) That the entire capital stock of \$15,000,000 was issued as fully paid, when in reality it was issued for property worth less than \$250,000. (2) The announcement that four quarterly dividends during the year 1902 were paid out of profits, when as a fact they were paid out of capital. (3) Issuing to stockholders and causing to be published statements to the effect that the company had earned and was earning net profits exceeding the amount of those dividends. (4) Inflating on the books of the company the valuation of its plants and assets for the purpose of creating an apparent surplus.

After detailing the facts required by Section 872 of the Code of Civil Procedure, the plaintiff, in his affidavit, in compliance with Rule 82 of the General Rules of Practice, states that the examination is material and necessary, in that he expects thereby to prove: (1) The fact that the defendants issued to themselves as fully paid the \$15,000,000 of stock for property which they knew to be worth less than \$250,000; (2) the discussions had at meetings of the board of directors in January, 1902, at which the valuation of the plants and other assets was increased so as to show the apparent surplus; (3) the proceedings and discussions which led to the declaration of the four quarterly dividends; (4) the statements made under the direction of the defendants to the Stock Ex-

change in order to obtain the listing of the stock; and (5) facts affecting the value of the stock within the knowledge of the defendants when they declared the dividends.

The contention first raised as a ground for vacating the order, that the defendants are residents of this county, are amenable to service of process, and intend to be present at the trial is untenable. The right given by the Code is absolute, and may be exercised at any time before or during the trial. It is not an answer to say that a party may be subpoenaed or even that he stipulates to be present at the trial (*Commercial Pub. Co. v. Beckwith*, 57 App. Div., 574, 68 N. Y. Supp., 600). The object of the statute is to enable a party to obtain the testimony of his adversary before trial, so that it may be used on the trial. The information desired by the plaintiff, and which will be necessary to the establishment of his cause of action, is to be deduced from many proceedings and events which are, to some extent at least, within the knowledge of the defendants, and the precise nature of which must be searched out and determined to enable the plaintiff to properly present his case. Were he, on his adversary's stipulation to attend, remitted to the time of the trial to elicit and piece together the information required, not only would he be deprived of the beneficial results contemplated by the statute, but he might, by reason of the defendant's non-attendance, be seriously prejudiced. The examination cannot be resisted on the ground that the plaintiff can produce the required evidence from other persons (*McKeand v. Locke*, 100 N. Y. Supp., 704, 115 App. Div., 174). The statute authorizes a party to examine his opponent where his testimony will tend to prove a necessary fact, and he is now required to show that the fact cannot be proved by other witnesses. "Where an issue of fact is presented to be determined upon the trial of the action, and where it appears that a

Turck v. Chisholm et. al.

party to the action has knowledge of facts which are material in the determination of that issue, either party to the action under these provisions of the Code is entitled to examine such a party and have his deposition taken for use at the trial" (*Goldmark v. U. S. Electro-Galvanizing Co.*, 111 App. Div., 526, 529, 97 N. Y. Supp., 1078).

Denial of knowledge cannot assist the defendants. If they have no knowledge of the matters embraced in the order for their examination, they have only to assert their ignorance on the hearing. If they have such knowledge, the plaintiff is entitled to it. If this were not the meaning of the statute, a mere denial of knowledge would defeat its operation. Further, the mere allegation of the defendants that the plaintiff is as fully acquainted with the facts as they cannot defeat the examination, in the face of the plaintiff's assertion to the contrary, especially when such assertion is supported by the surrounding circumstances and the significant fact that the plaintiff's connection with the corporation began long after the occurrence of the alleged fraudulent acts. There is no force to the objection that the plaintiff, as an officer of the company at one time, had access to the books (*Thomas v. Waite Co.*, 113 App. Div., 494, 99 N. Y. Supp., 297). But disregarding the broad effect given to the statute, and assuming that the plaintiff availed himself of that opportunity, it cannot be seriously contended that the information necessary to establish certain of the false representations could be derived from the entries in the books. The authorities called to my attention by the defendants, and which emphasized the importance of technical rules, have been superseded by recent decisions facilitating, instead of obstructing, the examination of one's adversary before trial (*McKeand v. Locke*, supra.; *Goldmark v. U. S. Electro-Galvanizing Co.*, supra). In the latter case the court, by Ingraham, J., says:

"Where there is no doubt of the good faith of a party to

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a litigation seeking to establish a fact essential to his cause of action by the testimony of his opponent, I can see no reason why a party is not entitled to have the knowledge of his opponent as to the fact which he wishes to establish put upon record, so that the evidence of that fact would be available to either party to the action when the trial takes place. It is not the duty of a court of justice to suppress the facts or throw obstacles in the way of either party in establishing the truth."

The defendants' charges of bad faith on the part of the plaintiff are mere conclusions, which are not only unsupported by any evidence, but are negatived by the facts disclosed. The motions to vacate must be denied with \$10 costs to plaintiff on each motion.

Motions denied, with \$10 costs to plaintiff on each motion.

CHARLES A. PEABODY, ET AL., RESPONDENTS, v.
LONG ACRE SQUARE BUILDING COMPANY,
APPELLANT.

NEW YORK COURT OF APPEALS, MARCH, 1907.

§§ 2254, 2256. •

Landlord and Tenant—Summary Proceedings—Default in Rent and Taxes.

In a proceeding to dispose a tenant, holding under a lease which has more than five years to run, for his default in the payment of rent and taxes, an order awarding delivery of the premises "by reason of the tenant's non-payment of said rent and said taxes, together with the costs," should be modified by striking out the statement that he was dispossessed for non-payment of the taxes, where the tenant, during the pendency of the proceedings, discharged the taxes, since under Code Civil Procedure, Section 2256, a tenant holding under a lease having at least five years to

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run, may, if dispossessed for non-payment of rent, redeem within a year, and under Section 2254 he may stay proceedings brought to dispossess him for non-payment of taxes by paying the amount he may be in default, but without right of redemption for non-payment of taxes, therefore the order should specify and be based only upon that default from which the tenant has not relieved himself; and the tenants failure to pay the cost of the proceeding, does not defeat his right to insist that the reference in the order as to payment of taxes by stricken therefrom, since judgment would necessarily go against him for costs for his default in the payment of the rent.

(Decided March, 1907.)

Appeal by defendant from an order of the Appellate Division, First Department, affirming an order of the Appellate Term which affirmed an order of the Municipal Court of New York City, made in summary proceedings. Reversed, and order of the Municipal Court modified.

Mr. Alton B. Parker, for appellant.

Mr. William G. Choate, for respondents.

CULLEN, C. J.—This proceeding was instituted by the respondents, as landlords, against the appellant, who held possession of certain premises in the city of New York under a lease for the term of twenty years from November 1, 1902, at an annual rent, until May 1, 1913, of \$15,200; the tenant covenanting to pay all taxes and assessments. The proceeding was founded on a default by the tenant in the payment of a quarter's rent due on the 1st day of May, 1904, and a failure to pay the annual taxes for the year 1903. The tenant answered, and the proceedings were adjourned. Pending the adjournment, the tenant paid and discharged the taxes. There was no substantial defense to the allegation of default in payment of the rent. Thereupon the judge of the Municipal

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Court made a final order awarding delivery of the premises to the landlord "by reason of the tenant's non-payment of said rent and said taxes together with the costs." On appeal this order was affirmed by the Appellate Term of the Supreme Court, and also by the Appellate Division of the First Department, in each instance by a divided court, and an appeal is taken to this court, by leave of the Appellate Division.

On examining the record, it appears that over the objection and exception of the tenant, the imposition of the tax and its non-payment was proved solely by the evidence of a witness as to what he had seen in the tax roll. It is at least doubtful whether this evidence was competent for the purpose for which it was offered; but, as the learned counsel for the appellant asks that the merits of the controversy be decided, we shall not discuss the question nor consider the technical objections presented to the Appellate Division. The appellant seeks on this appeal only to modify the final order of the Municipal Court by striking out the statement that the tenant is dispossessed for non-payment of taxes. The objection is not formal, but substantial, for, by Section 2256 of the Code of Civil Procedure, where at the time the tenant is dispossessed there remains unexpired five years or more of the demised term, the tenant may within a year redeem by paying the rent in arrears. There is no similar provision in favor of a tenant dispossessed for default in the payment of taxes, and it has been held that there is no right of redemption in such a case (*Witty v. Acton*, 58 Hun., 552, 12 N. Y. Supp., 757). The appellant contends that it will be barred from any right to redemption by the form of the final order in this proceeding, and therefore seeks its modification.

We are of opinion that the appellant was entitled to the modification sought. Summary proceedings to recover the possession of land were first brought into existence in

Peabody et. al. v. Long Acre Square Building Co.

this State by chapter 194, p. 176, of the Laws of 1820, and were limited to two cases: First, the expiration of the tenant's term; second, default in the payment of rent. In the latter case they could be maintained only where there was not sufficient distress on the premises to satisfy the rent. It was not coextensive with the landlord's right to maintain ejectment, and could not be maintained for a breach of any other covenant of the lease than that to pay rent (*Oakley v. Schoonmaker*, 15 Wend, 226; *Beach v. Nixon*, 9 N. Y. 35). In 1846 distress for rent was abolished, and in 1849 the provisions requiring the absence of sufficient distress as a condition for the maintenance of summary proceedings was repealed. The scope of these proceedings has, from time to time, been enlarged so as to include other causes, such as those of a purchaser at a sale on execution or on a foreclosure by advertisement and the like, but it has never been enlarged so as to include generally all cases where ejectment would lie. By chapter 162, p. 119, of the Laws of 1840, the proceedings could not be maintained when the unexpired part of the demised term exceeded five years. The last-mentioned statute was repealed, and in lieu thereof a tenant was given the right of redemption which still exists under Section 2256 of the Code. Under Section 2254, whenever a final order is made, the tenant may stay the issue of the warrant and further proceedings by payment of the taxes or rent, as to which he may be in default. Therefore, had these proceedings been instituted against the appellant for default in payment of taxes, it could have paid those taxes and terminated the proceedings. Had the proceedings been instituted for non-payment of rent, then the appellant, though unable to pay the rent, would have a year's time in which to redeem.

But the contention of the respondents is that, proceedings having been instituted for both defaults, the dispossession of the appellant is final, and it is on this ground

that the decisions below have proceeded; that is to say, that in such cases the tenant must pay both taxes and rent, or lose all interest in the premises. We cannot accede to this position. By authorizing summary proceedings for non-payment of taxes it could not have been the intent of the Legislature to in any degree impair the tenant's right of redemption after a dispossession for unpaid rent. Yet, if the doctrine which has prevailed below is to stand, this result has been most effectually accomplished. It is urged that the default in rent and taxes was but a single default. We think not. They are essentially different in their character because the results which flow from them are different. The judgment for one cause is for a redeemable annulment of the lease, for the other it is for an irredeemable annulment. Therefore, the defaults are essentially distinct. By joining both defaults in a single proceeding, the tenants cannot be deprived of any right they would have had, had separate proceedings been instituted. If the effect of the joinder is such as the courts below have held, it seems to us a conclusive argument that both defaults cannot be joined in the same proceeding. It is not, however, necessary to determine that question. If separate defaults, different in their character and results, can be united in a single proceeding, we are of opinion that the tenant must in that proceeding have the right to obtain relief from any of the defaults on complying with the conditions specified in Section 2254 of the Code, in the same manner as if the proceeding had been brought on that default alone. To protect its rights it is therefore necessary that the final order awarding judgment should specify and be based only upon the default or defaults from which the tenant has not relieved itself. Otherwise, the final order or judgment in the proceeding against it would be conclusive against the tenants in other actions (*Jarvis v. Driggs*, 69 N. Y., 143; *Reich v. Cochran*, 151 N. Y., 122).

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The objection that the tenant should have also paid the costs of the proceeding is without force. Judgment would necessarily go against it for the default in the rent, and that judgment would include costs. The tenant could not be required to pay these costs twice.

The orders of the Appellate Division and Appellate Term should be reversed, and the order of the Municipal Court modified by striking therefrom the reference to taxes with costs to appellant in this court only.

HAIGHT, VANN, WERNER and CHASE, JJ., concur.
GRAY and EDWARD T. BARTLETT, JJ., dissent.

Ordered accordingly.

GANSEVOORT BANK, RESPONDENT, v. EMPIRE
STATE SURETY COMPANY, APPELLANT.

SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT, FEBRUARY, 1907.

§ 533.

Pleading—Sufficiency of Allegations—Performance of Conditions.

A paragraph in a complaint in an action on a bond given as security for a note, alleging that before the commencement of the action every condition was fulfilled and all things happened and all things elapsed necessary to entitle the plaintiff to maintain the action, is insufficient under Code Civil Procedure, Section 533, which provides that "in pleading the performance of a condition precedent in a contract, it is not necessary to state the facts constituting performance; but the party may state, generally, that he, or the person who he represents, duly performed all the conditions on his part."

Pleading—Sufficiency of Complaint—Action on Bond.

A complaint in an action on a bond, given to secure a note states a good cause of action by alleging that the maker executed and

Gansevoort Bank v. Empire State Surety Co.

delivered to the plaintiff, for value received, his promissory note, by which he promised to pay to the plaintiff at a time stated the sum of five thousand dollars, and that the bond was given to secure the payment of the note, and that the maker of the note has wholly failed to discharge said obligation of five thousand dollars.

(Decided February, 1907.)

Appeal from a judgment of the New York Special Term overruling a demurrer to the complaint. Affirmed.

Mr. Benjamin Reass, for appellant.

Mr. William McArthur, for respondent.

McLAUGHLIN, J.—The defendant demurred to the complaint upon the ground that it did not state facts sufficient to constitute a cause of action. The demurrer was overruled and defendant appeals from the interlocutory judgment.

One Newman, according to the allegations of the complaint, applied to the plaintiff for a loan of \$5,000, upon his promissory note for that amount, payable four months after date. The plaintiff declined to make the loan without additional security, and thereupon the bond of the defendant was delivered to the plaintiff and the loan made. The note was not paid when due, was duly protested for nonpayment, and this action brought upon the bond. The bond is dated the 24th day of October, 1904; is under seal; and recites that Newman, as principal, and the surety company, as surety, are held and firmly bound to the plaintiff in the sum of \$10,000, payment of which Newman and the surety company bind themselves jointly and severally to make. Then follow these provisions:

“Whereas, the said Randolph M. Newman has applied to the Gansevoort Bank of New York for a loan of five thousand dollars (\$5,000) upon his promissory note dated this 24th day of October, 1904, and payable four months

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after date; and, whereas, the said Gansevoort Bank has declined to make said loan upon said note without additional and collateral security therefor, and for the faithful payment of said loan; and, whereas, the Empire State Surety Company, as an inducement to said Gansevoort Bank of New York to make said loan, executes this certain bond or obligation: Now, therefore, the condition of this bond or obligation is such that if the above-bounden Randolph M. Newman shall faithfully discharge and pay the said indebtedness of five thousand dollars (\$5,000), then and in that event this obligation to be void and of no effect, otherwise to remain in full force and virtue."

Copy of the bond is annexed to and made a part of the complaint. The complaint specifically charges:

"(3) That on or about the 24th day of October, 1904, at the city of New York, one Randolph M. Newman duly executed and delivered to the plaintiff, for value received, his certain promissory note, in writing, wherein and whereby he did promise to pay to the plaintiff above-named, four months after said date, \$5,000."

And that the note here referred to is the same one mentioned and referred to in the bond. The complaint then charges that the note, at maturity, was presented for payment, and was dishonored; that the same was duly protested; that Newman had wholly failed to discharge and pay the said indebtedness of \$5,000, or any part thereof, except \$1,500, and by reason thereof there had been a breach of the condition of the bond prior to the commencement of the action. Then follows the ninth paragraph, which contains an allegation that before the commencement of the action "every condition was fulfilled and all things happened and all times elapsed necessary to entitle the plaintiff to maintain this action for recovery on foot of said bond of the amount of said note therein mentioned * * * less by the said \$1,500."

The court at Special Term, as appears from the opinion,

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reached the conclusion that there was no allegation in the complaint that plaintiff loaned \$5,000 to Newman; that that was the condition of the bond, and the allegations as to the delivery of the note by Newman and acceptance by plaintiff were not equivalent to an allegation that the plaintiff loaned Newman \$5,000, for which reason the complaint was defective so far as any attempt was made to set out a common-law averment of performance, but that the ninth paragraph of the complaint might be construed as having alleged performance under Section 533 of the Code of Civil Procedure.

I am of the opinion that the ninth paragraph of the complaint does not allege performance under the section of the Code referred to. This section of the Code provides that in pleading the performance of a condition precedent in a contract it is not necessary to state the facts constituting performance, but the party may state generally that he, or the person whom he represents, has duly performed all the conditions on his part. When the ninth paragraph of this complaint is carefully considered, I am unable to discover where there is any allegation in it that the plaintiff has duly performed all the conditions on its part to be performed. At most, there is an allegation of general performance, and this, I think, insufficient. However, I am of the opinion, under the liberal system of pleading which now prevails, that the complaint states a cause of action irrespective of the ninth paragraph. It shows that Newman duly executed and delivered to the plaintiff, for value received, his promissory note, by which he promised to pay to the plaintiff, at a time stated, \$5,000, and that it was to secure the payment of this note that the bond in question was given. Some effect must be given to the words "duly executed and delivered" as well as "for value received." The note was for \$5,000. This is the amount which Newman promised to pay for value received. This necessarily implies, as it seems to me,

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that that amount was loaned, and certainly so when this allegation is taken in connection with the other allegation that Newman had, prior to the commencement of the action, "wholly failed to discharge and pay the said indebtedness of \$5,000."

The judgment appealed from, therefore, should be affirmed, with costs, with leave to the defendant to withdraw the demurrer and interpose an answer on payment of the costs in this court and in the court below. All concur except HOUGHTON, J., who dissents.

HENRY BELDEN, RESPONDENT, v. WILLIAM BELDEN, APPELLANT.

SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT, MARCH, 1907.

§ 2693.

Executors and Administrators—Revocation of Letters—Successor.

When letters of administration have been revoked, the surrogate's Court is only authorized to grant letters of administration to the successor in like manner as if the former letters had not been issued, and the same proceedings are required by Code Civil Procedure, Section 2693.

Executors and Administrators—Reinstatement.

A former administrator is not reinstated by the subsequent setting aside of the decree admitting the will to probate.

Executors and Administrators—Bond—Revocation of Letters.

The surety on the bond of an administrator is released by the decree of the Surrogate revoking the letters of administration.

(Decided March, 1907.)

Appeal by defendant from an order of the Supreme Court denying a motion to declare the action abated. Reversed.

Mr. Abraham Elkus, for appellants.

Mr. Charles L. Craig, for respondent.

MCLAUGHLIN, J.—On the 31st of August, 1902, Henry Belden, then a resident of the city of New York, died. On the 14th of June, 1904, letters of administration were issued to the plaintiff, and as such he shortly thereafter brought this action to compel the defendant William Belden, and other nominal defendants claiming through him, to account for certain property alleged to belong to the intestate. In October, 1904, the defendant William Belden discovered what purported to be the last will and testament of Henry Belden, deceased, and he filed the same for probate, and on the 24th of March, 1905, the same was duly admitted to probate by one of the Surrogates in the county of New York, and in the decree admitting it to probate the letters of administration issued to this plaintiff were revoked, and letters testamentary issued to the three persons named in the will as executors. In June, 1906, one of the persons interested in the estate of the decedent brought an action under Section 2653a of the Code of Civil Procedure to obtain an adjudication that the paper admitted to probate was not the will of Henry Belden. The action thus brought resulted in a judgment, to the effect that the paper was not the last will and testament of Henry Belden, deceased, and probate thereof was in all respects invalid. A certified copy of the judgment was thereafter duly filed, as provided in the section of the Code referred to, with the clerk of the Surrogate's Court. Subsequently this action being upon the day calendar, and about to be reached for trial, the defendants, by an order to show cause, moved that the same

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be declared abated, unless properly revived by the estate of Henry Belden within a period to be fixed by the court. The motion was denied, and defendants have appealed.

I am of the opinion that the order should be reversed. The plaintiff ceased to be administrator when the decree of the Surrogate's Court was entered canceling and revoking his letters. He could neither bind the estate, nor could any proceeding against him have any effect upon the estate. *Taylor v. Savage* 1 How. (U. S.) 282. The decree so provides. It is that the letters of administration theretofore issued to him "be, and the same hereby are, revoked, and all authority and right of the said Henry Belden as such administrator are hereupon to cease." The fact that the decree admitting the will to probate was subsequently vacated and set aside is of no importance, because that did not reverse or reinstate the decree which revoked the letters of administration issued to the plaintiff. The judgment simply determined that the paper writing produced, purporting to be the last will and testament of Henry Belden, is not his last will and testament, and that the "decree and probate thereof was and is in all respects invalid." When the letters of administration issued to the plaintiff were revoked he ceased to be an administrator and had no authority to in any way bind the estate formerly represented by him. When letters of administration are revoked, the Surrogate's Court is only authorized to grant letters of administration to the successor in like manner as if the former letters had not been issued and the same proceedings are required (Code Civ. Proc., Sect. 2693), and this is to be done upon a petition setting out the facts, showing that the person applying for letters is entitled to them, and if there be other persons having an equal right, then they must be cited to appear (*Id.* Sects. 2662 and 2663; *matter of Engelbrecht*, 15 App. Div. 541, 44 N. Y. Supp., 551). When the plaintiff was appointed administrator, he gave bond, with a

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surety satisfactory to the Surrogate, for the faithful discharge of his duties as such. The decree revoking the letters released the surety from future liability, nor was any liability imposed upon the surety by the judgment in the Supreme Court, declaring the decree admitting the will to probate invalid. One cannot act as an administrator without giving a bond, and this is an additional reason why it cannot be held that the judgment in the Supreme Court did not reinstate the respondent as administrator.

The order appealed from, therefore, must be reversed, with \$10 costs and disbursements, and the motion granted, with \$10 costs, unless the action be properly revived by some one representing the estate of the deceased, within twenty days after service of a copy of the order of this court, and notice of entry of the same.

INGRAHAM and CLARKE, JJ., concur. PATTERSON, P. J., and HOUGHTON, J., dissent.

THOMAS J. TYNAN, PLAINTIFF, v. AUTO MART
ET AL., DEFENDANTS.

SUPREME COURT, SPECIAL TERM, NEW YORK COUNTY,
FEBRUARY, 1907.

§§ 63, 66.

Courts—Attorneys—Right to Practice.

Under Code Civil Procedure, Section 63, only duly admitted attorneys are permitted to practice in the Municipal Court of New York City.

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Attorney and Client—Lien—Court—not of Record.

An attorney who has rendered services in an action brought in the Municipal Court of New York City has a lien, under Code Civil Procedure, Section 66, upon the amount received in settlement.

Attorney and Client—Enforcement of Lien.

An action to enforce an attorney's lien under Code Civil Procedure Section 66, for services rendered in an action in the Municipal Court of New York City may be brought in the Supreme Court.

(Decided February, 1907.)

Demurrer to complaint in action to enforce attorney's lien. Overruled.

Mr. M. Strassman, for plaintiff.

Mr. William J. Moran, for defendants.

BLANCHARD, J.—The plaintiff brings action to foreclose a lien which he alleges now subsists, by virtue of Section 66 of the Code of Civil Procedure, upon a cause of action in which the plaintiff's assignor, an attorney, represented one, Anna Gross, who brought action thereon in the Municipal Court of the city of New York, and subsequently compromised and settled said action without paying the plaintiff's assignor for his services as attorney. The defendant demurs, on the ground that the complaint, which sets forth the above facts, fails to state a cause of action.

Although it has several times been held that an attorney's lien could not be enforced in the Municipal Court of New York City, it does not appear to have been decided whether an attorney was allowed a lien under Section 66 of the Code of Civil Procedure upon actions brought in that court (*People ex rel. Jaffe v. Fitzpatrick*, 35 Misc. Rep. 456, 71 N. Y. Supp., 191; *Van Der Beck v. Thom-*

ason, 50 Misc. Rep. 524, 99 N. Y. Supp., 538). Section 20 of the Municipal Court act, which provides that the provisions of the Code of Civil Procedure "shall apply to the Municipal Court as far as the same can be made applicable," has been held as "merely intended to regulate the practice in matters over which the Municipal Court has jurisdiction" (*Matter of Bolte*, 97 App. Div. 577, 90 N. Y. Supp., 499). As was stated in *People ex rel. Jaffe v. Fitzpatrick*, *supra*, there is no provision of statute making Section 66 of the Code of Civil Procedure applicable to the Municipal Court of New York City. In *Drago v. Smith*, 92 Hun, 536, 36 N. Y. Supp., 975, it was said that Section 66, above mentioned, did not apply to a case in the Municipal Court of Buffalo. This court, however, differed from the Municipal Court of New York City; for, although in the Municipal Court of Buffalo every pleading was required to be subscribed by a duly admitted attorney (Laws 1880, p. 510, c. 344, Sect. 9), it was, nevertheless, permissible for persons not duly admitted as attorneys to practice therein. In the Municipal Court of New York City, however, none but duly admitted attorneys are permitted to practice (Code Civ. Proc., Sect. 63). In *Flint v. Van Dusen*, 26 Hun, 606, it was said that, so long as a surrogate's court was not a court of record, no lien could be acquired by an attorney upon an action therein. The reason,, as stated by the court, was that:

"In those courts there are no attorneys in the sense in which that term is used in courts of record (*Fox v. Jackson*, 8 Barb., 355), and it is only in respect of the party's character of attorney or solicitor that the claim to a lien exists. * * * No one will contend that a lien exists for services rendered by an attorney in a justice's court."

This decision, however, and the reasoning upon which it rests, was completely superseded by subsequent legislation making Surrogate's Courts courts of record and expressly

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recognizing the rights of parties to appear therein by attorney (*Matter of Regan*, 167 N. Y. 338, 342). The application of Section 66, above mentioned, to courts which are not of record, but in which only duly admitted attorneys may practice, is presented, therefore, as a new question.

In its present form Section 66 of the Code of Civil Procedure provides that "the attorney who appears for a party has a lien upon his client's cause of action, claim or counterclaim" from the moment he appears in the action. No limitation is made by the section as to courts in which the cause of action shall be prosecuted, unless possibly one can be spelled out of the provision that "the court, upon the petition of the client or attorney, may determine and enforce the lien." Strong reasons appear against implying such a limitation. It has been held that this section should be liberally construed (*Matter of Pieris*, 82 App. Div. 466, 81 N. Y. Supp., 927; Affirmed upon the opinion of Appellate Division in 176 N. Y., 566; *Fischer-Hansen v. Brooklyn Heights R. R. Co.*, 173 N. Y., 492, 499). This section shows the fixed determination of the legislature to protect attorneys against fraudulent settlements. It adds to the remedy of a lien upon a judgment, which was a device invented for the protection of attorneys "against the knavery of their clients, by disabling their clients from receiving the fruits of recoveries without paying for the valuable services by which the recoveries were obtained" (*Goodrich v. McDonald*, 112 N. Y., 157, 163). Lord Kenyon, many years ago, announced a sound principle in *Read v. Dupper*, 6 Term Rep., 362, which was approved in *Rooney v. Second Ave. R. R. Co.*, 18 N. Y., 368, 372, when he said:

"A party should not run away with the fruits of a cause without satisfying the legal demand of his attorney, by whose industry, and in many instances at whose expense, those fruits are obtained."

Although the accompanying provisions of the Code of Civil Procedure afford the attorney a remedy by petition, this remedy is merely cumulative, and accordingly separate and distinct actions may still be brought to foreclose the lien afforded by Section 66 (*Fischer-Hansen v. Brooklyn Heights R. R. Co.*, supra.; *Smith v. Acker Process Co.*, 102 App. Div. 170, 92 N. Y. Supp., 351). In line with this rule the courts have consistently discouraged the continuance of the action upon which the attorney claimed a lien when the sole purpose of continuance is to ascertain the amount of the lien (*Fischer-Hansen v. Brooklyn Heights R. R. Co.*, supra.; *Smith v. Acker Process Co.*, supra.; *Sullivan v. McCann*, 113 App. Div. 61, 98 N. Y. Supp., 947).

Such being the rule, it follows that the attorney is not obliged to bring his action upon Section 66 in the same court where his client's cause of action may proceed. Thus in *Matter of Pieris*, supra., it was held that the Supreme Court could entertain proceedings to ascertain and determine the amount of an attorney's lien for services rendered in a proceeding in a surrogate's court. The conclusion from these authorities is that the attorney is not deprived of his lien by reason of the inability of the court in which his client's cause of action was prosecuted to enforce the lien, and consequently that he may begin action in any court having jurisdiction to enforce such a lien, for the purpose of obtaining the relief granted by Section 66 of the Code of Civil Procedure. Such a conclusion is induced in the present case by a further fact that in the Municipal Court of New York City none but duly admitted attorneys who are authorized to appear before any court in the state may practice. In view of the qualifications thus required of practitioners before this court, they should not be denied the protection and benefits which Section 66 of the Code of Civil Procedure, by its express language, confers upon every practitioner "who appears

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for a party." Unless attorneys practicing in the Municipal Court of New York City are afforded such protection they will be reluctant to bring actions in that court, and will tend to increase litigation in the superior courts, for the relief of which the Municipal Court of New York City exists.

Demurrer overruled.

MATTER OF COOPE.

SURROGATE'S COURT, WESTCHESTER COUNTY, MARCH,
1907.

§§ 2703, 2704.

Wills—Foreign—Recording in this State.

Before a will probated in another state can be recorded in this state, under Code Civil Procedure, Sections 2703 and 2704, it must appear that all of the requirements regarding the execution of wills in this state have been complied with.

(Decided March, 1907.)

In the matter of the record of a copy of a foreign will.
Ordered recorded.

Mr. Arthur J. Burns, for applicant.

MILLARD, S.—This is an application by the owner of certain real estate in the city of Yonkers, to have an exemplified copy of the last will and testament and proofs thereof, as taken in Eaton county, Mich., recorded in this court, in accordance with the provisions of Sections 2703, 2704, Code Civil Procedure.

The petition clearly sets forth the ownership on the part of the petitioner of real estate situate in the city of

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Yonkers, within the state of New York; that such real estate was devised by the said last will and testament of Thomas Coope, who was at the time of his death a resident of Eaton county, in the State of Michigan; that his will has been admitted to probate in said Eaton county, in the State of Michigan, and is filed or recorded in the proper office as prescribed by the laws of that state. It also appears from the petition, and from an examination of the copy of said will thereto annexed, that said will was duly executed in conformity with laws of this state; all of the requirements of our law having been shown to have been complied with by the very full attestation clause attached to the will, and also by the testimony of the one witness, E. M. Kingsbury, who was sworn before the judge at the time of its probate. My attention has been called to the decision in the Matter of Hagar, 48 Misc. 43, 96 N. Y. Supp., 96, and, after carefully examining the facts in that case, and also the decisions cited in the learned opinion, I am convinced that the execution of the will in conformity with the laws of this state, must be shown to the satisfaction of the surrogate; but that it is not necessary to comply with the provisions and requirements of our law respecting the probate of a will to do this. If the Legislature intended otherwise, it would no doubt have made the provision read, "a will duly probated in conformity with the laws of this state" instead of duly executed in conformity with the laws of this state. My examination of the cases cited in the Hagar Case satisfies me that in each case it appeared directly from the papers submitted, that in some respect the execution of the will had not been in accordance with the laws of this state, and, for that reason, the record of the will was denied.

I believe that the provisions of Section 2703 of the Code of Civil Procedure have been complied with in every respect in the present application, and that nothing appears

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upon the face of the petition or other papers submitted which shows that the will of Thomas Coope was not properly executed in accordance with the laws of this state; but, on the contrary, it appears from the allegations in the petition in this case, from the attestation clause attached to the will, and from the testimony of the witness Kingsbury, that all the requirements regarding execution of wills in the state of New York have been complied with, and, under these circumstances, the papers submitted being authenticated, as provided by Section 2704 of the Code, I must direct that the will should be recorded in this office Order accordingly.

JOSEPH GALOWITZ, PLAINTIFF, v. MARIAN BUMFORD, DEFENDANT.*

NEW YORK CITY COURT, SPECIAL TERM, JANUARY, 1907.

§§ 1390, 1391, 1392, 2463.

Exemptions—Property Exempt—Working Implements.

A desk, counter, two chairs, three wagons, two sets of harness and a Dutch collar, owned by a widow who supports herself and five children from an income not exceeding fourteen dollars per week derived from an express business conducted by her, are exempt from execution under Code Civil Procedure, Sections 1390, 1391, 1392 and 2463, where their value is not shown to exceed \$250 and she has but \$7.47 in the bank, and a motion for a receiver of her property in supplementary proceedings will be denied.

(Decided April, 1907.)

*Note.—On the subject of the exemption of pension money and property purchased therewith, see exhaustive note 38 N. Y. Civ. Pro. 174. For wages as exempt property, see *Beard v. Covill*, 38 N. Y. Civ. Pro. 24.

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Application for the appointment of a receiver of the property of a judgment debtor. Denied.

Mr. Julius J. Michael, for plaintiff.

WADHAMS, J.—Application is made for the appointment of a receiver of the property of the judgment debtor after an examination in proceedings supplementary to execution. The judgment is for \$534.31, recovered as damages for loss of a package by the debtor's driver. The judgment debtor is a widow with five children. Her husband died in July, 1905, and since then she has been carrying on an express business. The testimony shows that the only property owned by her is a desk, a small counter, two chairs, three wagons, two sets of harness and a Dutch collar. The last horse owned by her died in November, and since then the horses have been hired. She has \$7.47 in the bank. Her income during the past three months from this business has ranged from nothing to \$14 a week. She testifies that she does not make more than a bare living out of the business, eking it out by renting out rooms at the house where she shares the rent with her sister.

The statute does not authorize the seizure of or other interference with any property which is expressly exempt by law from levy and sale by virtue of an execution (Code Civ. Proc., Sect. 2463). Sections 1390 and 1391 of the Code of Civil Procedure specify the personal property which is exempt, when owned by a householder or a person having a family for which he provides; and Section 1392 prescribes that, where the judgment debtor is a woman, she is entitled to the same exemptions. Among the exemptions specified are necessary household furniture, working tools, and team, not exceeding in value \$250. The property discovered is, in my opinion, under the circumstances disclosed, within the exemption, and there is no proof that it is of greater value than \$250. The ap-

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pointment of a receiver in this case would be an abuse of legal process. The earnings are all necessary for the use of a family supported by this judgment debtor. If the property were taken, it would leave a widow and orphans destitute. Supplementary proceedings are intended to be used to compel the application of property unjustly withheld to the payment of the judgment, but will not be permitted to work oppression by taking away the only means of support from the judgment debtor and those dependent on her.

The proceeding is dismissed, and the motion denied, with \$10 costs.

SAMUEL LUDLOW, JR., RESPONDENT, v. RIGNAL D. WOODWARD, APPELLANT.

SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT, FEBRUARY, 1907.

§ 500.

Pleading—Action on Note—Alleging Conclusions of Law.

The allegations in an answer in an action on a promissory note that the holder is not a bona fide owner, that he is maintaining the action for the benefit of the original payee, and is not the real property in interest, state a conclusion of law, are insufficient, and do not meet the requirements of Code Civil Procedure, Section 500, which provides that the answer must contain a statement of any new matter constituting a defense or counterclaim, in ordinary and concise language without repetition.

Pleading—Indefinite—New Matter.

An allegation is an action on a note, that the note after maturity and payment, was delivered to the plaintiff by an endorser for no value, is vague and indefinite, and does not state new matter con-

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stituting a defense within the requirements of Code Civil Procedure, Section 500.

(Decided February, 1907.)

Appeal by defendant from a judgment of the Special Term of New York County, sustaining a demurrer to an answer. Affirmed.

Mr. W. E. Kisselburgh, Jr., for appellant.

Mr. David T. Davis, for respondent.

LAMBERT, J.—The defendant has on two previous occasions answered the plaintiff's complaint, and the plaintiff demurs to this third effort to set up a defense to the cause of action alleged in the complaint. The action is brought on a promissory note made by the defendant to the order of one McCuaig, which note was indorsed to the Sovereign Bank of Canada for value before maturity. This much is conceded, and the bank thus became the owner in due course of business, and the note was unquestionably a valid obligation in the hands of the bank, regardless of equities between the maker and McCuaig. The answer alleges that:

The "defendant is informed and believes that the said Samuel Ludlow, Jr., the plaintiff in the above-entitled action, is not a bona fide owner and holder of said note, the subject of this action; that the said note, after maturity and payment, was delivered to the plaintiff by the Sovereign Bank of Canada for no value; and that the said plaintiff is maintaining this action for the benefit of said McCuaig, and is not the real party in interest."

The allegation that the plaintiff "is not a bona fide owner and holder of said note" is clearly a conclusion of law not admitted by the demurrer, and the further allegation "that the plaintiff is maintaining this action for the benefit of said McCuaig, and is not the real party in in-

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terest," is subject to the same comment (*Twelfth Ward Bank v. Brooks*, 63 App. Div., 220, 71 N. Y. Supp., 388). The Code of Civil Procedure requires (Section 500) that the answer must contain a "statement of any new matter constituting a defense or counterclaim, in ordinary and concise language without repetition;" and the mere affirmative allegation of conclusions of law does not meet this requirement. And the very vague and indefinite allegation "that the said note after maturity and payment was delivered to the plaintiff by the Sovereign Bank of Canada for no value" is not stating new matter constituting a defense in the "ordinary and concise language" which common fairness and good pleading demand. There is no allegation as to who made the payment, or that any one, in fact, made a payment, and the fact that the note may have been transferred to the plaintiff, without consideration, by the bank which has come into possession of the same, in due course, is not a defense to this action, in the absence of some allegation that the plaintiff was a party to the alleged fraudulent inception of the note. The bank, as the owner and holder of the note in due course, as between the plaintiff and defendant, had a perfect right to transfer the same without consideration. The plaintiff merely stands in the shoes of the Sovereign Bank of Canada, and the latter concededly came into possession of the note in such a manner as to be relieved of the equities between the maker of the note and McCuaig.

The interlocutory judgment appealed from should be affirmed, with costs.

MCLAUGHLIN and SCOTT, JJ., concur. PATTERSON, P. J., and HOUGHTON, J., dissent.

WILLIAM S. HURLEY, RESPONDENT, v. JEREMIAH ROBERTS, APPELLANT.**SUPREME COURT, APPELLATE DIVISION, SECOND DEPARTMENT, MARCH, 1907.**

§ 987.

Witnesses—Convenience—Change of Venue.

When the court is in doubt in regard to what issues the defendant intends to try, it is proper to deny a motion for change of venue for convenience of witnesses, as permitted by Code Civil Procedure, Section 987, subd. 3.

(Decided March, 1907.)

Appeal by defendant from an order of the Special Term of Kings County, denying a motion for a change of venue for convenience of witness. Affirmed.

Mr. John F. Murray, for appellant.

Mr. George Freifield, for respondent.

GAYNOR, J.—The complaint alleges that the defendant agreed to deliver to the plaintiff 800,000 bricks in the city of Troy on or before May 12th, 1905, but that he failed to deliver 144,250 thereof, to the plaintiff's damage \$288. A second cause of action is that the plaintiff overpaid the defendant \$190.50 on the contract.

Instead of meeting the complaint with a denial or denials, as the simple rules of pleading require (Code Civ. Proc., Sect. 500), so that the issue could be readily seen, the answer is a long statement of facts, which has to be compared critically and patiently with the complaint to ascertain in what particular, if any, it differs therefrom. Near the end of the answer to the first cause of action the defendant "denies each and every statement (meaning allegation) "contained in the first cause of action set forth in the complaint" (as though it could be set

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forth anywhere else) "not herein specifically admitted or denied," and there is a similar denial to the second cause. These are the only denials, except of any damage, or sum owing. The defendant's attorney evidently regards every allegation of fact which differs with the allegations of the complaint as a "specific" denial, and throws upon the court the work of picking out such allegations, pen in hand. The learned judge below must have been in much doubt in respect of what issues the defendant understands are to be tried and intends to try, and of course he could not see whether proposed witnesses were material without understanding this. In addition to this, there is a so-called counterclaim which is not complete in itself, and is no counterclaim, which the defendant's list of witnesses or some of them are to be called to prove. As the defendant can serve their convenience by leaving them at home, the venue does not need to be changed on their account.

The order should be affirmed.

Order affirmed, with \$10 costs and disbursements. All concur; HIRSCHBERG, P. J., and RICH, J., in result.

WILLARD P. LITTLE, ET AL., RESPONDENTS, v. TOM
L. JOHNSON, APPELLANT.

SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT, FEBRUARY, 1907.

§ 829.

Witnesses—Transactions with Descendent.

One who brings an action upon a quantum meruit for services alleged to have been rendered to defendant's testator in preparing certain preliminary studies for a house, is incompetent, under Code Civil Procedure, Section 829, to testify that he had frequent consultations with testator and especially interviews with testator and his wife, at which plans were discussed between the witness and the wife of the deceased, and that a large part of the services consisted of these consultations and interviews.

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Witnesses—Transactions with Deceased—Indirect Testimony.

Code Civil Procedure, Section 829, relative to testimony as to transactions with a deceased person, forbids not only direct testimony by a survivor that a personal transaction did or did not take place, but also every attempt by indirection to prove the same thing.

(Decided February, 1907.)

Appeal by defendant from a judgment of the Trial Term of New York County in favor of plaintiffs in an action for personal services. Reversed.

Mr. Francis G. Gaffey, for appellant.

Mr. Richard O'Gorman, for respondents.

SCOTT, J.—Plaintiffs sued upon a quantum meruit for services alleged to have been rendered to defendant's testator in preparing certain preliminary studies for a city house. The plaintiffs produced, as the studies for which compensation was sought, a number of sketches, for the most part rough, and obviously intended merely as suggestions of elevations and room plans. Of course, in order to recover, it was incumbent upon plaintiffs to show that they had prepared the sketches under some employment or authorization by the deceased, and some agreement, express or implied, upon his part, to pay compensation therefor. The deceased owned no property in the city upon which to erect the house, and had not fully decided to acquire such property. He seems to have contemplated the possibility of acquiring property and building a house, and it is quite possible that plaintiffs' purpose in preparing the sketches was to induce him to carry his contemplated purchase into execution. Were it not for the admission of some evidence which we deem to have been improperly admitted, there would not have been sufficient evidence of employment to justify submitting the case to the jury.

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The plaintiff Little was called as a witness on his own behalf. Of course, he could not testify, and was not permitted to testify, as to any oral communication made to him by the deceased. The plaintiffs, however, sought to establish an implied promise on the part of the deceased to pay for the sketches by showing that he had frequent interviews and consultations with them respecting the sketches while they were being prepared, and the plaintiff Little, under sufficient objections and exceptions, was allowed to testify that he had a number of consultations and interviews with deceased, and especially an interview with him and his wife, at which the plans were discussed between the witness and the wife of the deceased, and the witness further testified that a large part of the services for which compensation was sought consisted of these very consultations and interviews. Under the circumstances, this evidence was clearly incompetent, under Section 829 of the Code of Civil Procedure. It is well settled that the section not only forbids direct testimony by a survivor that a personal transaction did or did not take place, and what did or did not occur between the parties, but also every attempt by indirection to prove the same thing (*Clift v. Moses*, 112 N. Y., 426). The plaintiffs sought to establish the fact that deceased had employed them and agreed to pay for their work by way of inference from the fact that he constantly consulted with them while they were engaged upon the work. Little's testimony as to the fact and number of these consultations was therefore an attempt to prove by himself the facts as to the personal relations between himself and the deceased from which the inference of employment and promise were to be drawn (*Lerche v. Brasher*, 104 N. Y. 157). The admission of this evidence requires the reversal of the judgment.

Judgment and order reversed, and new trial granted, with costs to appellant to abide the event. All concur.

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NICHOLAS R. MEADE, RESPONDENT, v. SOUTHERN
TIER MASONIC RELIEF ASSOCIATION, APPEL-
LANT.*

SUPREME COURT, APPELLATE DIVISION, THIRD DEPART-
MENT, MAY, 1907.

§§ 837, 870, 872, 873.

Discovery—Examination before trial—Sufficiency of affidavit.

An affidavit for the examination of defendant before trial, under Code Civil Procedure, section 870 et seq., is not insufficient because made on information and belief and not accompanied by the affidavit of the informer, where the sources of affiant's information and the grounds of his belief are stated.

Witnesses—Privilege—Incriminating corporation.

The right to refuse to answer questions upon an examination before trial on the ground that the answers may incriminate a corporation, whose officer the witness is, is not available.

Witnesses—Privilege—Criminal prosecution barred.

A witness cannot claim a privilege under Code Civil Procedure, section 837, from answering questions upon an examination before trial when it appears that any criminal prosecution or action to recover a penalty is barred by the Statute of Limitations.

Witnesses—Time to assert privilege.

The time to assert the privilege to refuse to answer questions because of the possible incriminating character of the answers, as permitted by Code Civil Procedure, section 837, is not upon the application for an order for examination before trial, but upon the examination.

* See note at end of case.

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Discovery—Examination before trial—Corporate officers.

Code Civil Procedure, sections 870, 872, and 873, which provide for the examination of a party before trial, do not authorize the examination of a corporate officer as such, apart from the examination of the corporation itself.

(Decided May, 1907.)

Appeal by defendant from a judgment of the Supreme Court of Chemung County denying a motion to set aside an order for the examination of a corporate officer before trial. Modified.

Messrs. Reynolds, Stanchfield & Collin, for appellant.

Messrs. Allen & Sabine, for respondent.

CHESTER, J.—The action is brought to recover what is claimed to be the amount remaining unpaid on a beneficiary certificate issued by the defendant association upon the life of one William Conard for \$3,000. He died in November, 1905, and the defendant paid to the beneficiaries under the certificate the sum of \$866.13. Thereafter the executor of the estate of Conard and the beneficiaries under the certificate assigned their right to recover the balance of \$2,133.87 to this plaintiff. The action is on the theory that the defendant fraudulently concealed from Conard the fact that it was not paying its certificates in full, to induce him to pay his premiums for many years, in the belief that his certificate was good for the full amount of its face value.

The defendant objects to the affidavit upon which the order for the examination was made on the ground that it was made on information and belief, and was not accompanied by the affidavit of the informer, and no reason was given for the failure to produce it. The sources of the affiant's information and the grounds of his belief are stated, and are said to be information received from a son of the insured, and from an examination of notices of assessment and papers

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found in the possession of the insured at the time of his death, purporting to have been issued by the defendant. The statements of the son, therefore, were not the sole source of the affiant's information, but he had for his information documents purporting on their face to have been issued by the defendant. The authorities condemning affidavits made on information and belief are where the statements of the informer were the sole source of the affiant's belief, and therefore are not applicable to this affidavit. In the affidavit it is stated that the reason why the examination of Beers is desired before trial, rather than at the trial, is because all the formal proof of the matters alleged and the custody of the documents, books, and records of the defendant relating thereto are exclusively in the control of the defendant and of said Beers, and cannot be obtained from any other source.

The right to the examination of the defendant here is fully sustained by the very recent and well-considered case of *Goldmark v. U. S. E. G. Co.*, 111 App. Div. 526, 97 N. Y. Supp. 1078, and in the subsequent case of *McKeand v. Locke*, 115 App. Div. 175, 100 N. Y. Supp. 709. In the last-named case it was said, in reference to the *Goldmark Case*:

"That decision sweeps away many technical rules which were fast growing up in the practice of examining one's adversary before trial, and establishes the rule for this department that, in the absence of bad faith or the abuse of process, a party to an action is entitled to examine his adversary before trial as to facts which are material to the issues, and of which he has knowledge, and take his deposition for use on the trial, and that it is no answer to such application that the party making it can procure the evidence from other persons, or could subpoena his opponent for the trial."

It is also objected that the examination may require Beers to incriminate himself, or subject himself or the defendant to a penalty; but that objection is deprived of any force, as it appears that any criminal prosecution and any action to recover a penalty for any of the acts complained of is barred

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by the statute of limitations, and, if they were not, the privilege of a witness does not operate to excuse him from incriminating a corporation whose officer he is. *Hale v. Henkel*, 201 U. S. 43; *Nelson v. United States*, 201 U. S. 92. Even if the witness is privileged, the opportune time to assert such privilege is upon the examination, and the order should not be withheld for that reason.

The defendant makes the further objection that the statute under which the examination is ordered (sections 870, 872, and 873, Code Civ. Pro.) does not authorize the examination of an officer of a corporation as such, apart from the examination of the corporation itself. There appears to be force in this objection. While in the recital for the order for examination it is stated that this is a proper case for an examination of the defendant before trial, yet the order in form is simply one for the examination of the secretary of the defendant, and not of the defendant. There appears to be no authority in the provisions of the Code referred to for the examination of an officer of a corporation party before trial, separate from the examination of the corporation itself. This has been expressly so held in the recent case of *Jacobs v. Mexican Sugar Refining Co.*, 112 App. Div. 657, 98 N. Y. Supp. 542. It is there said that:

"There is no authority to examine an officer of a corporation as such, apart from the examination of the corporation. The provisions of the Code of Civil Procedure authorize the examination of a party, including a corporation, and prescribe that, where the party is a corporation, the examination shall be had by examining one or more of its officers. The proper practice in such a case is to authorize the examination of the party, and then, the party being a corporation, the order should provide that the information is to be elicited by an examination of certain of its officers."

This case was followed in *Shumaker v. Doubleday*, 116 App. Div. 302, 101 N. Y. Supp. 587.

Nevertheless it is apparent here that the plaintiff desired

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an order for the examination of the defendant by examining its secretary, and the moving papers were ample to sustain such an order, yet for some reason the order was made to run against the secretary alone. We think that, instead of denying the motion to vacate the order to examine, the Special Term should have modified it, so that it should have been in form one to examine the defendant, by requiring its secretary to appear before the referee and be examined, and requiring the defendant, through him, to produce the books and papers mentioned in such order.

Order modified accordingly, and, as modified, affirmed, with \$10 costs and disbursements. All concur.

**NOTE.—RIGHT TO RESIST APPLICATION FOR EXAMINATION
BEFORE TRIAL ON GROUND OF PRIVILEGE.**

It is the general rule that an application for the examination of a party before trial will not be denied because questions may be asked which may incriminate the witness, since such objections should be raised upon the examination itself. *Ryan v. Reagan*, 46 App. Div. 590, 62 N. Y. Supp. 39; *Rosenbaum v. Rice*, 36 Misc. 410; 73 N. Y. Supp. 714; *Campbell v. Brocks Com. Agency*, 38 App. Div. 137, 56 N. Y. Supp. 540; *Matter of Porter Screen Mfg. Co.*, 70 App. Div. 329, 75 N. Y. Supp. 286; *Skinner v. Steele*, 88 Hun 307, 34 N. Y. Supp. 748; *Davies v. Fisk*, 35 Hun 430; *Sprague v. Butterworth*, 22 Hun 502; *Haynes v. Hatch*, 15 N. Y. Supp. 433; *Meade v. Southern Tier Mas. Relief Asso.*, 39 N. Y. Civ. Pro. R. 33; *Mechanical Orguinette Co. v. Haynes*, 39 N. Y. Civ. Pro. R. 49; *Canada Steamship Co. v. Sinclair*, 3 N. Y. Civ. Pro. R. 284; *Ball v. Evening Post Pub. Co.*, 12 N. Y. Civ. Pro. R. 4; *McGuffin v. Dinsmore*, 4 Abb. N. C. 241; *Batterson v. Sanford*, 45 N. Y. Super. Ct. (13 J. & S.) 127.

The question whether information sought to be elicited by the examination of the defendants in an action (ejectment)

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might tend to criminate them will not be considered until the examination takes place. *Ryan v. Reagan*, 46 App. Div. 590, 62 N. Y. Supp. 39.

An order for the examination of the defendant before trial will not be denied because of the fact that the defendant will be privileged from giving evidence as to some of the matters as to which the plaintiff desires to examine him, since the witness can claim his privilege upon the examination as to the matters to which he may be entitled to such privilege. *Fogg v. Fisk*, 30 Hun 61.

The object of the examination in *Canada Steamship Co. v. Sinclair*, 3 N. Y. Civ. Pro. R. 284, was to identify goods stolen from the plaintiff, which it was claimed came into the possession of the defendant. The court left the objection of privilege to be disposed of upon the examination itself.

An order for the examination of the plaintiff before trial to enable the defendant to frame its answer, was held in *Farmer v. National Life Asso.*, 73 Hun 522, 26 N. Y. Supp. 126, to have been properly granted where the affidavit alleged that at the time of the issuance of the policy it was the intention of the insured and of the plaintiff that such insurance should be taken out for the benefit of the latter only; that plaintiff was the person who paid the premium on the policy and that he had, then, and thereafter no insurable interest in the life of the insured; that the latter never applied for a policy and that it was obtained by fraud; that another man who falsely represented the insured, was examined by the defendant's medical examiner before the policy was issued; and that the policy never had a lawful inception and was null and void. The court held that the objection that the plaintiff might be required to give answers which would subject him to criminal prosecution, was premature; that the plaintiff must submit to the examination and if it then appears that the answers may incriminate him, that will be the time to have the objection disposed of; but that it is not apparent that matters upon which the examination is sought will involve criminality.

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In an action to recover the price of bales of rags sold to the defendant, an order for the examination of the plaintiff was held to have been improperly denied where the defendant made an affidavit stating that the sale was fraudulent and void, and that the goods were not what they were falsely and fraudulently represented and warranted to be; that they were packed in bales so as to be incapable of internal examination; that on opening some of the bales they were found to contain about one-quarter in weight of substances other than rags which were no pecuniary value; that a return of the goods was insisted on, but refused by the plaintiff, and that the defendant desired to examine the plaintiff to prove that the contents of the bales not yet opened, and to prove the fraudulent and deceitful packing and his knowledge of the fraud. The court stated, that if it appeared upon the examination that the answers to questions would tend to criminate or degrade him, or subject him to a penalty or forfeiture, he could then claim the privilege. The court also said that "we cannot, however, be certain that every question will necessarily be privileged. On the contrary, we can see that there may be proper inquiries which plaintiff could not refuse to answer." *Sprague v. Butterworth*, 22 Hun 502.

In *Davenport Glucose Mfg. Co. v. Taussig*, 6 N. Y. Civ. Pro. R. 152, the court held that in an action to recover personal property from persons who are alleged to have induced the sale by fraud, the venders may be required to appear for examination before trial, and the fact that some questions may be asked which the witness may refuse to answer upon the ground that they are not bound to criminate themselves, and that each witness may claim the personal privilege of refusing to answer, was not regarded as sufficient to prevent the court from making the order.

It appeared from the affidavit in *Haynes v. Hatch*, 15 N. Y. Supp. 615, that the witness sought to be examined was a stock broker who purchased certain stock with funds furnished by the plaintiff. Thereafter the defendant loaned the

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same with the consent of the plaintiff and subsequently made an assignment for the benefit of creditors. Plaintiff made application for an order for the examination of the defendant for the purpose of acquiring information to enable him to frame his complaint in an action for a recovery of the stock or for its conversion. The court held that the motion for the order cannot be opposed on the ground the testimony sought, if elicited upon the examination, might subject the defendant to criminal prosecution, since many facts may be elicited which may be disclosed with impunity. The court distinguished *Kinney v. Roberts*, 26 Hun 166.

Where, in an action by an administratrix to recover damages for the death of her intestate, alleged to have been caused by the defendant's negligence, an order for the examination of the defendant before trial was granted, and the defendant objected to being sworn and examined on the ground that negligence, being punishable as a crime, he might be compelled to criminate himself; the court in *Griesmann v. Dreyfus*, 4 N. Y. Civ. Pro. R. 32, held that the fact that questions might be asked, the answers to which might tend to criminate the witness, afforded no justification for his refusing to be sworn. The court also held that his objection was premature, and involved as against an entire examination a personal privilege which only could be urged as against a specific question.

In *Judah v. Lane*, 14 Daly 308, 12 St. Rep. 130, which was an action based on the alleged misuse of funds, the court said that the defendant cannot evade the examination on the ground that its tendency might be to criminate him or make him liable to a penalty or forfeiture. "Undoubtedly," said the court, "if any specific questions were put on such examination, which would if defendant answered it make him directly liable to an indictment for felony, he might plead his privilege * * *. But the witness may not refuse to be sworn on the trial of an action because, in his opinion, the general tendency of his proposed examination will be to criminate him."

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And in *Edison Mfg. Co. v. Hazard*, 58 N. Y. Super. Ct. (26 J. & S.) 566, the court held that an order for the examination of a party before trial will not be vacated on the ground that it might call for testimony that could be used to subject the party to a statutory penalty.

And in *Frothingham v. Broadway & S. A. R. Co.*, 9 N. Y. Civ. Pro. R. 304, the court held the fact that the purpose of the examination is to procure evidence of fraud on the part of the defendants who are to be examined, forms no ground for the refusal of the order.

In *Fox v. Miller*, 20 App. Div. 333, 46 N. Y. Supp. 837, the Court held that an order for the examination of the plaintiff was properly granted in a case in which the defendant by his affidavit showed that the defense to the note, upon which the action was based, would be that of usury and that he was ignorant of the details of the transaction and of the facts necessary to be pleaded in connection with that defense. The plaintiff objected to the order on the ground that the examination would compel the disclosure of facts which would constitute a criminal offense. But the court said that there was nothing in the record to show that the crime of usury had been committed, or that any facts existed which would render the plaintiff liable to criminal prosecution under the statute.

Upon an application to vacate an order for examination before trial, it was urged that an order cannot be granted to produce evidence to establish charges of fraud, deceit, and fraudulent conspiracy. In this case an action was brought by a minority stockholder of a corporation to prevent the officers and directors from proceeding in the consummation of a scheme to divert the assets into another corporation. An order to examine the two companies was granted, and a motion was made to vacate the order. The court said that criminal charges were not involved in the application, and in any case most of the testimony sought will not have a tendency to criminate. *Rosenbaum v. Rice*, 36 Misc. 410, 73 N. Y. Supp. 714.

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It was held to be error in *Davis v. Fish*, 35 Hun 430, to set aside the order for the examination of the defendant before trial. In this case an action was brought by the receiver of an insolvent firm of brokers against one of the partners and against the general assignee of that partner and the general assignee of the firm, to enforce an equitable lien upon the assets in the hands of the assignee of the defendant partner, for money wrongfully withdrawn from the firm by his assignor. The plaintiff procured an order for the examination before trial of the defendant partner, upon an affidavit stating that the partner withdrew money from the firm as profits, which he was not entitled to receive, since no profits had been realized and the firm was insolvent, and that he withdrew such funds with the intent to defraud creditors. The court held that the objection that the examination would tend to establish the commission of some criminal offense was untenable, since the wrongful withdrawal of the moneys from the firm did not constitute a criminal offense under the laws of the state.

The fact that the acts for which penalties are sought to be recovered are misdemeanors, under section 408a of the Penal Code, was held in *People v. Armour*, 18 App. Div. 584, 46 N. Y. Supp. 317, to be no reason for denying the plaintiff the right to examine third persons.

But when it appears that any criminal prosecution or action to recover a penalty is barred by the statute of limitations, a witness cannot claim a privilege. *Meade v. Southern Tier Masonic R. Asso.*, 39 N. Y. Civ. Pro. R. 33.

The burden of proof upon an application to vacate an order for the examination of a party before trial is upon the party alleging that there are material matters with reference to which he cannot be examined on the ground that he cannot be compelled to criminate himself. *Corbett v. DeComeau*, 5 Abb. N. C. 169, 44 N. Y. Super. Ct. 306, reversing 4 Abb. N. C. 252, 54 How. Prac. 506.

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But an order for the examination of a party before trial will not be issued when it appears that such party is privileged from testifying as to all of the material matters upon which the examination is sought. *Kugelman v. Barry*, 17 Misc. 30, 40 N. Y. Supp. 767; *Mechanical OrguINETTE Co. v. Haynes*, 39 N. Y. Civ. Pro. R. 49; *Walker v. Dunlevey*, 4 N. Y. Civ. Pro. R. 38; *Beebe v. Richardson*, 2 N. Y. Civ. Pro. R. 319; *Ball v. Evening Post Pub. Co.*, 12 N. Y. Civ. Pro. R. 4; *Greensward v. Union Dime Sav. Inst.*, 59 How. Prac. 399; *Skinner v. Steele*, 88 Hun 307, 34 N. Y. Supp. 748; dictum in *Matter of Attorney-General*, 21 Misc. 101.

"Where it is not shown," said the court in *Abbott-Downing Co. v. Faber*, 87 Hun 299, 34 N. Y. Supp. 433, "that there is any fact which the witness could testify to, except such as would be privileged, it would be useless to make the order for the examination." This was an action brought to charge the defendant with the statutory liability for filing a false report while director of a corporation.

Where it appears that an order for the examination of a party before trial would, of necessity, compel him to invoke the protection of the court, it was held in *Walker v. Dunlevey*, 4 N. Y. Civ. Pro. R. 38, that the order should be denied.

It was a fundamental rule of the Court of Chancery that it would not compel a defendant to discover that which, if he answered in the affirmative, would subject him to punishment, or render him infamous, or expose him to a penalty. *McIntyre v. Mancius*, 16 Johns. 592; *Kinney v. Roberts & Co.*, 26 Hun 166.

For that reason the court would not compel a defendant in an action for libel or slander to furnish evidence in answer to a bill for discovery, to maintain the action and subject himself to punitive damages, they being in the nature of a penalty. *Bailey v. Dean*, 5 Barb. 297; *March v. Davison*, 9 Paige 580.

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It was held in *Phoenix v. Dupuy*, 7 Daly 238, 2 Abb. N. C. 146, that under the old code, sect. 391, a defendant could not be examined as to whether he had published an alleged libel against the plaintiff.

And in *Miller v. Brook*, 65 Hun 624, 20 N. Y. Supp. 359, an order was vacated, providing for the examination before trial of the plaintiff in an action for libel. The court held that the case was governed by the decisions in *Starkosch v. Press Pub. Co.*, 6 N. Y. Supp. 246, and *Kinney v. Roberts*, 26 Hun 169.

Kinney v. Roberts & Co., 26 Hun 166, was an action to recover damages for the publication in a newspaper of an alleged libel charging that the plaintiff, who was a candidate for the office of county judge, was, during the war of the rebellion, a "rebel spy," and as such had been arrested and imprisoned. It appeared from the affidavit for the examination that the only facts and circumstances on which the defendant desired to examine the plaintiff were such as tended to show that the latter was a rebel spy and as such had been arrested and imprisoned. On an appeal from an order denying a motion to vacate an order for examination, the court held that inasmuch as the answer to every question would render him infamous the plaintiff would be privileged from answering them, and therefore the order should have been granted, as it could only serve to compel the plaintiff to appear upon the record as pleading his privilege.

From the application in *Brandon Mfg. Co. v. Bridgman*, 14 Hun 122, it was apparent that it was designed to obtain from defendants information connecting them with the publication of an alleged libel to the injury of the plaintiff's business, and that the court held that the order was erroneously granted, on the ground that the answers may criminate or tend to criminate the person giving them.

In *Glen Cove Mfg. Co. v. Sutro*, 6 N. Y. Supp. 384, which was an action to recover damages for slanderous statements made concerning the plaintiff's business, the

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court denied a motion for the examination of defendant on the ground that the object of the examination was evidently a "fishing expedition."

"While it was true," said the court in *Funk v. Tribune Asso.*, 4 N. Y. Civ. Pro. R. 408, "that the courts will not compel a defendant, in an action for libel or slander, to furnish evidence in answer to a bill of discovery to maintain the action and subject him to punitive damages in the nature of a penalty (citing 5 Barb. 297; 9 Paige 580; 2 Abb. N. C. 158; 14 Hun 122) the rule does not prevent the defendant compelling a discharge from a plaintiff of the truth of the alleged libel, where such discovery will not subject him to a criminal prosecution, or to a penalty or forfeiture, or render him infamous." A similar statement was made by the court in *Ball v. Evening Post Pub. Co.*, 12 N. Y. Civ. Pro. R. 4. The court in the *Funk* case directed that no question be asked, the answer to which may in any way subject the plaintiff to a criminal prosecution or compel her to plead her privilege as an excuse in not answering.

The court in *Campbell v. Brock's Com. Agency*, 38 App. Div. 137, 56 N. Y. Supp. 540, refused to vacate an order requiring the examination of the defendant's officers in an action of libel against a commercial agency, since the examination did not necessarily involve any information which might charge the officers with a crime. The court said that the officers are not charged with libel, and it cannot be assumed that they are personally guilty because one of the employees of the corporation sent out libelous articles to the subscribers.

Where it is apparent that the entire object of the examination is to show by the testimony of the defendant and by his books and papers that he had obtained certain property from the plaintiff by means of false representations concerning his circumstances and his ability to pay, the order will not be granted. *Yamato Trading Co. v. Brown*, 2 N. Y. Civ. Pro. R. 6.

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An order for the examination of a defendant before trial at the instance of the plaintiff as to his solvency or his insolvency, in an action to recover certain goods alleged to have been sold to the defendant on the faith of representations that he was financially responsible when in fact he was wholly insolvent should not be granted. *Walker v. Dunlevey*, 4 N. Y. Civ. Pro. R. 38. The court said that while insolvency is not itself a crime, testimony as to it would be good only so far as to furnish a link in the chain of proof that the defendant had committed a crime.

In *Andrews v. Prince*, 4 N. Y. Civ. Pro. R. 330, the court held that in an action founded upon fraud and deceit in obtaining money, an order for the examination of one of the defendants will be denied, where it appears that the object of the examination is to procure testimony to establish the fraud charged. The court said that this doctrine rests upon the provisions of the Constitution of this State, which declares that no person shall be compelled in any criminal case to be a witness against himself. The court did not regard *Canada Steamship Co. v. Sinclair*, 3 N. Y. Civ. Pro. R. 285, as in conflict with this case, but if it were, the court said, it would not be regarded as overruling, since it was a Special Term Case.

In an action by a judgment creditor to set aside a conveyance and chattel mortgage on the ground of fraud, it was held in *Russ v. Campbell*, 1 N. Y. Civ. Pro. R. 41, that the defendant cannot be examined as a party before trial, at the instance of the plaintiff. The court relied upon *Burbank v. Reed*, 1 N. Y. Civ. Pro. R. 42, in reaching this conclusion.

In *Franks v. Reimer*, 9 N. Y. Supp. 273, the defendant's affidavit for the examination of the plaintiff alleged that the note in suit was obtained from him by means of a conspiracy, and that he desires to ascertain whether the plaintiff was a party to the crime. The application was denied.

The case of *Burbank v. Reed*, 1 N. Y. Civ. Pro. R. 42,

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was an action brought to have declared fraudulent and void as to the plaintiff a certain assignment for the benefit of creditors. The court held that the testimony sought to be obtained by an examination before trial related exclusively to facts, which, if proved, would show that the defendant was guilty of a crime under 2 R. S. 690, sect. 3, and there the court held that the order was improperly granted. Similar decisions were rendered in *Beebe v. Richardson*, 2 N. Y. Civ. Pro. R. 319, and in *Mechanical Orguinette Co.*, 39 Civ. Pro. R. 49.

In an action to set aside certain conveyances as in fraud of creditors, it was held in *Kugelman v. Barry*, 17 Misc. 30, 40 N. Y. Supp. 767, that the order for the examination of a party before trial as to the consideration and that a certain deed was given in fraud of creditors should be denied since, under sect. 586 of the Penal Code one who gives such a deed is guilty of a misdemeanor, and the party sought to be examined cannot be compelled to testify to facts proving or tending to prove that the deed was fraudulent, as such testimony is privileged. The court said that it clearly appears by the affidavit that the only material evidence sought by the examination would tend to show that the witness was guilty of a misdemeanor. The court further said that "the cases holding that an order to examine a party is proper, although he may be privileged from testifying as to some, but not as to all, of the matters in relation to which the examination is desired, manifestly can have no bearing in a case where it appears that the party is privileged from testifying as to all the material matters upon which the examination is sought."

But the court in *Tenney v. Mautner*, 1 N. Y. Civ. Pro. R. 64, held that in an action to set a general assignment for the benefit of creditors on the ground of fraud, the defendant may, on a proper showing be examined before trial at the instance of the plaintiff. For statement of facts on which the order was based, see the opinion.

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An order for the examination before trial of the president of a corporation, such as a bank, and requiring him to produce books of the corporation, will be vacated, where the sole object of the examination is to obtain evidence that will subject the corporation to a penalty or forfeiture. An officer of a national bank cannot be examined as a party before trial solely for the purpose of showing that the bank has taken usurious interest, for the reason that the taking such usurious interest, if proved, would subject the bank to a penalty or forfeiture. *Davies v. Lincoln Natl. Bank*, 16 N. Y. Civ. Pro. R. 68.

And in *Matter of Attorney General*, 21 Misc. 101, 47 N. Y. Supp. 20, there is a dictum to the effect that if a corporation is to be a defendant its officers are excused from testifying for the same reason which excuses individuals, citing *Davies v. Lincoln Natl. Bank*, 16 N. Y. Civ. Pro. R. 68.

The complaint in *Gilpin v. Daly*, 59 Hun 413, 13 N. Y. Supp. 390, which was an action brought to recover money lost by the treasurer of a corporation at a gambling establishment, kept in whole or in part by the defendant, charged the defendant with violations of the Penal Code, which makes it unlawful for one to receive from another money won at any game of chance and declaring it to be a misdemeanor to keep a gambling house. Plaintiff was denied the right to examine the defendant, since the allegations of the complaint brought the action within the language and spirit of section 341 of the Penal Code. *Gilpin v. Appleby*, 13 N. Y. Supp. 394 is a similar case.

But in *Meade v. Southern Tier Mas. Relief Asso.*, 39 N. Y. Civ. Pro. R. 33, the court held that the right of a person to refuse to answer questions upon examination before trial on the ground that the answers may incriminate a corporation, of which the witness is an officer, is not available.

The Mechanical OrguINETTE Co. v. Haynes.

THE MECHANICAL ORGUINETTE CO., APPELLANT,
v. JOHN C. HAYNES ET AL., RESPONDENT.

SUPREME COURT, GENERAL TERM, FIRST DEPARTMENT,
OCTOBER, 1884.

Practice—Examination of Party before trial.

The rule applicable to the granting of an examination of a party before trial in a case involving matters which might subject the party examined to a criminal prosecution is, that where it clearly appears that the only material evidence in the case that can be called out from the party sought to be examined beneficial to the other party must of necessity tend to establish his criminal guilt, the Court will not require examination before trial; but where it appears that any testimony material to the case may be given which has not of necessity that tendency, the examination may be had, leaving the party to assert his privilege if he choose not to answer such questions as have that tendency.

In an action in which several of the defendants are charged with having obtained property by means of a fraudulent conspiracy, an examination before trial of a defendant to whom it is alleged that such property was transferred with notice or knowledge of such conspiracy, and without consideration, as to such notice or knowledge and the consideration paid by him is proper.

(Decided October, 1884.)

Appeal from an order vacating an order for the examination of the defendant Stafford before trial. Order reversed.

The complaint in this action charged several of the defendants with obtaining by fraudulent conspiracy the assignment of certain patents to themselves and went far enough to show, if its allegations were true, that those defendants were guilty of a consummated criminal conspiracy amounting to a misdemeanor. It is charged also that the property so obtained was afterward sold and transferred by the conspirators to the

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defendant Stafford with knowledge or notice on his part of alleged fraudulent conspiracy or without the payment of any valuable consideration. An order was obtained by the plaintiff for the examination of Stafford, before trial, as to his knowledge or notice of the alleged fraud of the other defendants and as to the question of consideration paid by him. A motion was made to vacate this order on the ground that the answers upon such examination would necessarily tend to criminate said defendant, and this motion was granted by the Court.

Herbert T. Ketcham, for appellant.

Thomas B. Smith, for respondent.

DAVIS, P. J.—Held, That such an examination of the defendant Stafford was allowable. That it did not follow, because he took the property with knowledge or notice of the fraudulent conspiracy by which the other defendants obtained it, that he was therefore guilty of their misdemeanor consummated some time before, and the plaintiff had a clear right to examine him and to establish, if possible, by his evidence, any fact showing actual or implied notice of the wrong of his vendors or assignors which at law or at equity tended to impeach his title as a purchaser or assignee.

That the rule in such a case is, that where it clearly appears that the only material evidence in the case that can be called out from the party sought to be examined beneficial to the other party must of necessity tend to establish his criminal guilt, the Court will not require examination before trial, because of the inutility of such an examination. But where it appears that any testimony material to the case may be given which has not of necessity that tendency, the examination may be had, leaving the party to assert his privilege if he chooses not to answer such questions as have that tendency. Order reversed.

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DANIELS, J.—Agreed that the defendant Stafford might be lawfully compelled to answer any questions tending to prove the fact that he acquired whatever rights were claimed by him with either actual or constructive notice of the alleged fraudulent conspiracy, and as that was as far as the opinion of Davis, P. J., went he also agreed to the disposition of the appeal therein directed.

BRADY, J., concurred with DANIELS, J.

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SURROGATE'S COURT, KINGS COUNTY, FEBRUARY, 1907.

§§ 1019, 2546.

Reference—By Surrogate—Report—Time.

The provisions of Code Civil Procedure, section 1019, that on a trial by a referee of an issue of fact or law, a report must be delivered within sixty days after the submission, do not apply to a reference by a Surrogate to take proof and report, under section 2546.

Reference—Time—Limitation.

The time within which a referee has jurisdiction to act, is not limited by Code Civil Procedure, section 1019, in the absence of an election by the parties, or one or more of them to terminate the reference.

Reference—Time of filing of report—Waiver.

Such conduct on the part of the parties to a reference as in fairness estops a man from taking advantage of the strict letter of the law, may operate as a waiver of the provisions of Code Civil Procedure, section 1019, as to when the referee must file his report.

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Reference—Termination.

A case is not deemed closed, although the taking of proof has been concluded, while the referee, in good faith, at the request of any party, holds the reference open to enable such party to submit a fact material in his judgment, though the matter may appear to be unnecessary.

(Decided February, 1907.)

Motion to set aside report of referee. Denied.

Messrs. Owen & Sturgis, for accounting executors.

Messrs. Butler, Notman, Joline & Mynderse, for Central Trust Company, trustee.

Mr. J. Edwards Wyckoff, for Harriet W. R. Leach, individually and as executrix.

Mr. Grant Notman, special guardian, for Leech infants.

Messrs. Kenneson, Crain, Emley & Rubino, for Elizabeth De Witt Coombs, individually and as executrix.

Mr. J. Noble Emley, for William H. Coombs, trustee for Elizabeth De Witt Coombs.

Mr. Edward J. Mone, for Josephine B. Towle.

Mr. Milan Day Barnes, for William B. Leonard.

Mr. John B. Coleman, for Mabel R. Dumbell.

Messrs. Perkins & Jackson, for Esther H. Underhill.

Mr. Charles H. Kelby, special guardian, for John G. Underhill and Herman L. Underhill.

CHURCH, S.—This is a motion to vacate and set aside a referee's report on the ground that, at the time it was made, more than 60 days had elapsed since the matter had been finally submitted to him, and the attorney for one of the parties has elected to terminate the reference in accordance

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with the provisions of section 1019 of the Code of Civil Procedure. The order of reference in this case is dated January, 1903, and the reference has proceeded with many adjournments and delays since that time. The most complicated questions were considered, and, if the opposition of the moving party is tenable, the entire four years' litigation goes for naught and will practically have to be gone over again from the beginning. It is not contended that all of the evidence which it is possible to take on the issues involved has not been submitted, or that, upon any new hearing, any circumstances will be shown which will in any way affect the result reached. But the moving party stands upon the technical rights which he claims under section 1019 of the Code and asks for the strict enforcement of its provisions. While the subject is one in which the court has no discretion, and, hence, if the moving party has made out the facts bringing the case within the provisions of the section quoted, it must impose the penalty therein provided, yet it is perfectly manifest that this section should be construed in the same manner as statutes of a similar character—that is, strictly; and, unless the case is clearly within the letter of the statute, the motion should be denied.

The record discloses that, from the time of the first session to the delivery of the final report, there was a series of hearings, rehearings, adjournments, and delays, which are not unusual in referred matters. The attorney for the moving party does not, by either of the two notices which he gave electing to end the reference, nor by his motion papers, disclose the time at which he contends the case was deemed finally submitted to the referee and from which the 60 days given to the referee by the Code should be reckoned. But a long affidavit which he submits, of so much of the proceedings as he deems to be important, lays the subject generally before the court. It becomes necessary, therefore, to recite briefly the order of events before the referee:

At the outset, it may be stated that, although 11 sets of

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attorneys, appearing for as many different parties, were concerned in the case, the main controversy seems to have narrowed down between counsel for the executors and Kenneson, Crain, Emley & Rubino, counsel for the Coombs interests, and Mr. Coleman, counsel for Mrs. Dumbell, the daughter of Mrs. Coombs, who had a remainder interest. In this connection it is, perhaps, proper to call attention to the fact that Coleman and Kenneson, Emley & Rubino had their offices in the same building and in close proximity, and that upon the reference Coleman acted for Kenneson, Emley & Rubino's clients, and that the brief which they subsequently submitted was the joint brief of both—in fact, that almost at the inception of the reference Mr. Kenneson stated to the referee and had placed on the record the fact that Mr. Coleman was to act as attorney for his clients. The impression was therefore given to the referee by these parties that any request made by either was to be deemed the request of both, and that any action taken by either was to be deemed the action of both. The matter was submitted to the referee, and by virtue of various stipulations in writing, signed by all of the parties, the time of the referee to report was duly extended to July 6, 1906. On the 30th day of June, 1906, the referee made and signed a report, which is the report offered for confirmation, and gave notice of the rendering of the same, together with a copy thereof, to all of the attorneys.

The whole of the present controversy arose thereafter, in consequence of what, in my opinion, is the mistaken belief of the attorneys with respect to the requirements of the Code in relation to the report. The provisions of the Code which will show this mistake will be discussed hereafter. It appears that the counsel for the executors, and also counsel for Coombs, were under the belief that it was imperative upon the reference to make and sign findings of fact and conclusions of law; and this belief was shared by the other parties, who, to protect their interests, thought it was nec-

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essary that there should be before the referee proposed findings and conclusions of law, to the refusal of the referee to find any of which they could take proper exception. And while it does not appear that the referee definitely determined as to whether this contention was correct, yet it is evident that he yielded to the requests of the attorneys and permitted them to have an opportunity to submit the findings and did not file his report; and accordingly, by several extensions, their time to submit was extended to August 8, 1906. About the 1st of August requests were made to him to further extend the time in which all parties could finally submit all papers in the controversy until October 1st. On August 4th, four days before the stipulation made by all the parties expired, the referee wrote a letter in which he stated that, if it was desired to have him pass upon the findings, so that they might be filed with his report, it would be necessary for him to have a week after such findings were handed to him to file his report, and said that, unless he heard from any of the attorneys to the contrary, he would assume that this arrangement was satisfactory. The receipt of this letter by Coleman, counsel for the moving party, is conceded; and it is also conceded that he did not object thereto or make any request to the referee to shorten the time asked for by the other attorneys. Now, as the parties who were most solicitous for an opportunity to submit proposed findings of fact and conclusions of law were the firm of Kenneson, Emley & Rubino, his co-laborers, it may be deemed that the request for an adjournment had practically come from the moving party. At this time it is apparent the referee was anxious to report and end the matter, and that it was only in consequence of the importunities of these attorneys that he did not do so.

At the time he wrote the letter referred to—on August 4, 1906—he delivered his report to the counsel for the executors, with the statement that, as the parties had asked for an adjournment until October to file their requests, the report should not be filed until then, so as to give them the oppor-

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tunity to comply, but that he deemed it advisable, as a means of protection (apparently in view of the new delay), to make delivery of the report. On September 24th, the referee wrote to the attorneys, calling attention to the delays that had occurred and stating that he would like to dispose of the reference, and trusted that they would shortly arrange that the same be settled. Upon requests from Kenneson, Emley & Rubino for further time to submit their proposed findings, the time was extended to October 18th. At this period it was not disclosed to the referee, nor was it apparent in any way in the proceedings, that there had been any severance in the relations between Coleman and Kenneson, Emley & Rubino; but the condition which existed at the commencement of the case, that each represented the other, was apparently still continuing. On October 15th, the referee again wrote to Kenneson, Emley & Rubino, soliciting them to file their requests, as he was desirous of delivering his report. The following day, Owen & Sturgis, counsel for the executors, duly filed their requests to find, and Kenneson, Emley & Rubino wrote to the referee, acknowledging the receipt of his letter of the previous day and stating that negotiations were in progress for the settlement of the controversy, and asking further time to file requests. The time was accordingly extended to October 25th. On October 23d a further letter was sent by Kenneson, Emley & Rubino to the referee, stating that the negotiations for settlement were still pending, and again soliciting an extension until November 7th.

Further oral representations were made to the referee that these negotiations were still in progress, and further requests made for more time. While the matter was in this state, Mr. Coleman, on behalf of his client, Mrs. Dumbell, served a notice on November 13th that he elected to terminate the reference. This action of Coleman, in electing to terminate the reference on the ground of alleged delay, when the only delay was due to the importunities of the attorneys of record for the parties whose interests he himself also represented,

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was manifestly a surprise to all parties. The referee immediately gave notice to all the parties that they were required, within two days from the receipt of the same, to file their requests to find, after which time no further appeals for extensions would be granted. A representative of Kenneson, Emley & Rubino called upon the referee and disclaimed any part in the conduct of Coleman, and explained that it was evidently prompted by some friction between Coleman and his firm. At this time Emley had his requests to find, which he delivered to the referee; but he also solicited the latter to withhold the filing of his report, as, notwithstanding the action of Coleman, the negotiations for a settlement were still in progress, and he believed there was still a prospect of their success. To these requests the referee consented; and on November 22d, Kenneson, Emley & Rubino gave to the parties notice of motion for a reargument of the case before the referee on November 30th. On November 23d a stipulation was filed with the referee that the time to file findings of fact and conclusions of law should be extended to December 4th. This stipulation, however, contained the provision that it was without prejudice to the rights of any party. On November 30th the motion for a reargument was adjourned until December 10th, and on December 4th a stipulation extending the time to file findings until December 11, which was in exactly the same form as the one of November 23d, was made. On December 10th a hearing was had upon the notice of motion given by Kenneson, Emley & Rubino. At the inception of this hearing, Coleman objected to the same "on the ground that the referee has no jurisdiction." For what reason he claimed that the referee had no jurisdiction is not disclosed, nor does it appear in his motion papers. This objection was overruled, a reargument was had, and at the conclusion of it the referee asked if there was any reason why he should not then file his report. Accordingly he filed his report on December 15th, together with findings and proposed findings of the

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various parties, and gave notice to all that he had done so. His report was dated December 12th; but on December 14th Coleman served another notice, stating that he elected to end the reference, on the ground that the referee had failed to report within the time allowed by law.

There does not seem to be any dispute as to the correctness of these facts. The difference and divergence which have arisen grow out of the varying contentions as to their effect and as to the legal questions involved. At the outset of the discussion of the law affecting the matter, it is important that we carefully consider the provisions of the Code covering this subject. These are to be found under title 2, chapter 10. In the Supreme Court a referee may be appointed to hear and determine, in which case he has all the powers of a judge, and upon his decision judgment is entered with like effect as if it were the decision of a judge, and an appeal is taken directly to the Appellate Division. By section 1023 it is provided that, upon a trial before a judge or referee, the attorneys for the parties must submit in writing proposed findings of fact, upon which the court or referee must note whether he has found or refused to find the same, before the rendering of his decision or report. Section 1015 of the Code provides that the court may, wherever it is necessary for its information, order the referee to take proof and report to the court his opinion thereon. It is manifest, therefore, that the provisions of section 1023 with relation to findings do not apply to a reference which is merely to take proof and report, as provided in section 1015. *Matter of Sprathoff*, 50 Misc. Rep. 109, 98 N. Y. Supp. 921, affirmed 112 App. Div. 918.

But the order of reference in this case was not made under any of the provisions of title 2 of chapter 10, but came within the provisions of section 2546 of the Code, which permit a surrogate to refer certain matters to take proof and report. That being so, an inspection of section 1019 discloses that it was not intended to apply to a reference in the Surrogate's

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Court and, therefore, that the entire basis upon which the moving party has acted is wanting. Section 1019 provides that, upon the trial by a referee of an issue of fact or law (which is manifestly the reference to hear and determine referred to in sections 1011-1014), and also upon a reference in pursuance of section 1015, the report must be delivered within 60 days. If it was intended to have the provisions of this section apply to a reference under section 2546, it is apparent that the Legislature would have said so; and this being a section subject to strict construction, it cannot be extended by implication. In none of the cases which I have been able to find from a diligent examination of the reports was it ever attempted to have the provisions of section 1019 apply to a reference emanating from the Surrogate's Court. On the contrary, in somewhat similar references it was distinctly held that the provisions of section 1019 did not apply. In *Matter of Bennett*, 21 Abb. N. C. 238, 1 N. Y. Supp. 27, it was expressly held that a reference to take proof of the amount of the compensation due an attorney did not come within section 1019 of the Code. This adjudication was followed in *Doyle v. Mayor*, 26 Misc. Rep. 61, 56 N. Y. Supp. 441, and in *Bennett v. Pittman*, 48 Hun, 612, 1 N. Y. Supp. 27. In *Godding v. Porter*, 17 Abb. Prac. 374, it was held that:

"The section of the Code requiring referees to report within sixty days does not apply to a case of a reference under the approval of the surrogate."

This is sufficient to deny the motion; but, in view of the importance of the proposition to the various parties, it seems desirable that every phase of this branch of the situation should be taken up and disposed of. Mr. Coleman's contention, in which he is joined in the argument of this motion by Mr. Kenneson, is that, if the time within which the cause shall be finally submitted has been fixed, the referee has no power, upon the request of any of the parties, to extend the same, and that, if he does so, even if he exhibits

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perfect good faith, his jurisdiction is lost, and the motion to elect to end the reference should be granted. Beyond his mere assertion that this is the law, he quotes no authority to sustain him; nor does he show any reason for placing such a construction upon section 1019 of the Code. None of the following cases, which seem to be the important ones bearing on this subject, sustains the contention: *Parker v. Baxter*, 19 Hun, 410; *Gregory v. Cryder*, 10 Abb. Prac. (N. S.) 289; *Gill v. Clark*, 31 Misc. Rep. 337, 65 N. Y. Supp. 406; *Dwyer v. Hoffman*, 39 Hun, 360; *Patterson v. Knapp*, 83 Hun, 492, 32 N. Y. Supp. 32; *Morrow v. McMahon*, 71 App. Div. 171, 75 N. Y. Supp. 534; *Tallmadge v. Lounsbury*, 59 N. Y. Super. Ct. 132, 13 N. Y. Supp. 602; *Morrison v. Lawrence*, 2 How. Prac. (N. S.) 72; *Bennett v. Pittman*, 48 Hun, 612, 1 N. Y. Supp. 27; *Godding v. Porter*, 17 Abb. Prac. 374; *Doyle v. Mayor*, 26 Misc. Rep. 61, 56 N. Y. Supp. 441; *Little v. Lynch*, 99 N. Y. 112; *Ballou v. Parsons*, 52 How. Prac. 164, affirmed 55 N. Y. 673; *Foster v. Bryan*, 16 Abb. Prac. (N. S.) 396; *Richards v. Bloom*, 5 Hun, 182; *Thiesselin v. Rossett*, 3 Abb. Prac. (N. S.) 54.

On the contrary, from the reading of many of them, it is apparent that the direct opposite is the case. From a general examination of these cases the following principles may be deduced as covering the situation in hand: That the statute should be strictly construed was determined in *Bennett v. Pittman*, 48 Hun, 612, 1 N. Y. Supp. 27, in which the General Term said:

"The provisions of the section are stringent and should be carefully limited to the cases expressly mentioned therein."

In *Gregory v. Cryder*, 10 Abb. Prac. (N. S.) 296, it was held that:

"The jurisdiction of the referee ceased by the service of the notice. The order referring and all subsequent proceedings are a mere nullity, the same as if not existing. * * * The statute is plain in its requirements and the duty of the court is fairly to apply and carry it into effect."

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To the same effect are *Morrow v. McMahon*, 71 App. Div. 171, 75 N. Y. Supp. 534; *Little v. Lynch*, 99 N. Y. 112, and *Geib v. Topping*, 83 N. Y. 46.

The provisions of the Code in question do not prevent the referee from acting after the expiration of the 60 days, and his report is good unless there has been a delay of 60 days and some one of the parties has made the election under the section. If the party has not done so, he cannot object to the confirmation of the report or move to set it aside because made subsequent to the time allowed by the Code. *People v. Holley*, 12 Wend. 481, in which the court said:

"It is not a condition precedent to its validity that their report be made within 60 days."

In *Foster v. Bryan*, 16 Abb. Prac. 396, it was held that:

"There is no limitation imposed upon the power of the referee to make a valid report, although more than 60 days have elapsed, unless one of the parties has taken some step manifesting an intention to proceed as if no reference had been ordered."

A referee has power, upon the application of any party, to enlarge the time within which the case shall be finally submitted. *Morrison v. Lawrence*, 2 How. Prac. (N. S.) 72. "The referee has power to enlarge the time for the submission of briefs, as he would have the power to postpone the argument of the case beyond the day fixed, if the case was to be submitted on oral argument." The report provided by section 1019 of the Code means a simple report of the referee's decision. Hence, if, in the case of a referee appointed to hear and determine, whose duty it is to file findings of fact and conclusions of law, a report informal in form be submitted within the 60 days, he has complied with the section. *Tallmadge v. Lounsbury*, 59 N. Y. Super. Ct. 131, 13 N. Y. Supp. 602. "Plaintiffs take the ground that the document filed by the referee was not a report within the meaning of the Code. Although it is the case that the documents contained no findings of fact, as required by the Code, this omission did not prevent the document having the character

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of a report, even if such report be extremely imperfect and an insufficient foundation of a judgment. * * * The referee had made, within the intent of section 1019, his report within the 60 days, and, having made it, such as it was, the plaintiff was not entitled to end the reference."

The time of the referee to report, in addition to being extended by formal stipulation, is deemed extended by such conduct of the parties as in fairness should estop the litigant from taking advantage of the strict letter of the law. *Dwyer v. Hoffman*, 39 Hun, 360, in which the motion to vacate was denied, "although the 60 days allowed by section 1019 had expired, upon the ground that the delay was caused by the defendant's propositions and attempts to accomplish a settlement, and it would be unjust to allow him to take advantage of his own acts. Such a state of facts withdrew the omission to take up or file the report from the operation of the statute. * * * It would be unfair, where the delay is occasioned by the unsuccessful party and for his benefit, to permit him to avail himself of an advantage thus gained, and his acts should be declared in effect a consent for the enlargement of the time within which the report should be made." In *Gill v. Clark*, 31 Misc. Rep. 337, 65 N.Y. Supp. 406, the court said:

"It is unquestionably true that section 1019 was enacted for the benefit of parties to litigation, and may be waived by them. This may be done not only by formal stipulation, but by such conduct as in fairness estops the litigant from taking advantage of the strict letter of the law."

Parties may agree orally, in the presence of the referee, that he shall file his report at an indefinite time; and, if one of the parties desires to terminate the reference, he cannot do so abruptly by service of a notice of election. *Ballou v. Parsons*, 67 Barb. 19. "The fairer and better rule would be, as it seems to me, to require in such case a notice to the party and referee, one or both, that, unless the report is made and delivered within a reasonable time, to be specified, say 10 or 20 days, the reference will be deemed ended. This would render definite what was before left by stipulation indefinite.

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This rule is in conformity, also, with that applied to all agreements when the performance is left indefinite, and it is just in its application." Affirmed 55 N. Y. 673.

In the face of the law, as outlined by the foregoing decisions, there can be no question that the delivery of the report on August 4th to the attorney for the executors was a compliance with the section of the Code referred to; and, as that was within the time which by express stipulation the referee had to decide the case, the mere fact that subsequently there was some further discussion in relation to findings and a redelivery of the report to the referee did not give to any of the parties the right to terminate the reference. All that the Code requires is that the referee shall either file with the court or deliver to the attorney his report. If the attorney, or the various attorneys, after that is done, try to get the referee to take the report or to do any other act, while they may make such act the basis of a motion asking the court to intervene, yet such a situation is not covered by the provisions of section 1019, as the sole right given to the party by that section is based upon the failure of the referee to make a report, and no mention is made as to what shall be done in the event of the referee or the parties desiring to change or modify such report. As I have heretofore shown, by referring to the sections of the Code in question, this report was complete and perfect, and in any circumstances, under the doctrine of *Tallmadge v. Lounsbury*, was sufficient to take the case out of their provisions. This establishes, therefore, a second reason for the denial of the motion.

But, passing the same and taking up the subsequent events, we necessarily have presented to us the question as to when, under the statute, the case is to be deemed finally submitted, and when, under the facts in this case, the matter was so finally submitted. Upon this subject it seems to me that the Code and the foregoing decisions determine that, upon the conclusion of the taking of testimony, if the referee in good faith, upon the application of any party, is willing to hold

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the reference open to permit such party to submit anything deemed necessary by such party, then the case is not yet finally submitted. It is not a question of whether the papers to be submitted are sufficient to the controversy. It is not whether at this time they are to be regarded as matters which are controlling; but the sole question is, was there in good faith an extension of time by the referee to submit papers given in pursuance of a request which was also made in good faith? It is a matter of experience that zealous attorneys may want to submit matters which, to a person separated from the interest which they have in the litigation, may appear unnecessary. It is immaterial whether such papers to be submitted are exhibits, briefs, or findings, provided they are pertinent to the controversy, if the request is made in good faith, and the action of the referee in giving the party time is made in good faith. As there is nothing in the entire record which shows that the requests for time to submit briefs were not made in good faith, and as there is nothing showing that the referee's action thereon was otherwise than in perfect good faith and with a desire to be courteous and to conserve the rights of the litigants, the decision of this matter becomes a very simple one.

In determining the time at which the case was finally submitted, we will take up, first, the conditions which preceded and which existed on November 13th, the day of the first notice of election to terminate the reference. The referee's letter of August 4th—in which he stated that an application had been made to extend the time for the submission of findings until the 1st of October, and that if this was granted he would need a week thereafter, and further saying that, in the absence of objection, he would assume that this was consented to—not being resisted or controverted in any way, unquestionably operated as an extension of the time to the 7th of October. And by oral requests this time was evidently further extended until October 15th. In pursuance of an application by letter, the referee extended the time to Oc-

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tober 23d and, by subsequent letter, to November 7th. From these letters it is apparent that, although the extension was obtained for the ostensible purpose of enabling the parties to submit their findings, in fact the extension was asked for in consequence of the negotiations for settlement which were pending between all of the parties. Thus, even if in this way the time to submit had by accident passed, yet the case is brought squarely within the doctrine of *Dwyer v. Hoffman* and *Gill v. Clark*, *supra*. The power of the referee to thus extend, upon the application of a party in good faith, is within the decision of *Morrison v. Lawrence*, *supra*.

On November 7th, and shortly thereafter, there were further oral requests for time and statements that the matter was in negotiation. Even, therefore, if November 7th be regarded as the last day for parties to submit findings, and until which the referee had given them to submit findings, his time to pass thereupon and make his report ran for 60 days from that time, namely, until January 7th; and hence the notice of election given by Mr. Coleman on November 13th lacked the basis of the neglect of the referee to make a report within 60 days after the matter was finally submitted, because, in the face of the requests of the parties, it cannot be said that this matter could be deemed to have been finally submitted previous to November 7th. That this condition of affairs arose in consequence of the delay of the parties to get the papers which they desired to have passed upon before the referee into his hands, and not a neglect of his to pass upon any matter which was before him, is further confirmed by his notice of November 13th, in which he requires all parties to submit their findings within two days under penalty of his refusing them further time. In pursuance of this notice, Kenneson, Emley & Rubino submitted their findings, and some of the other parties asked for additional time to do so. On November 19th Kenneson, Emley & Rubino had the referee give notice that on November 30th there would be a reargument of the matter; and a few days later

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the stipulation of November 23d was made extending the time to December 4th.

It is the contention of the moving party that this stipulation, by virtue of its being stated to be "without prejudice," did not operate to extend the time within which the case should be submitted. I am unable to accept this interpretation. Any such construction would be an absurdity, because it would in effect be saying that "the time is hereby extended to December 4th and that such time is not extended." My theory of the effect of the notice is that it sufficed to extend the time to December 4th, and that the statement that it was "without prejudice" meant without prejudice to any of the rights of the parties, except the one of opposing the extension of time. That being so, even if the notice of November 13th to elect to end the reference was properly given, the rights under it were waived by the consent of November 23d. Upon November 30th the time of the hearing of the motion for a reargument was adjourned to December 10th; and in pursuance thereof the stipulation of December 4th was entered into by which the time to finally file papers should be extended to December 11th. And, of course, I give the same effect to this stipulation as to the one of November 23d; both being in the same terms. Therefore, by express stipulation in this case, the time within which the same was to be finally submitted was extended until December 11th. On December 10th the parties appeared for the purpose of the reargument. Coleman, on behalf of his client, contended that the referee had no jurisdiction. Kenneson, on behalf of his client, however, desired to be heard, and evidently reargued the matter at some length. The fact that none of these delays were delays of the referee in making his report, but were due to the parties not getting the matter into final shape before the referee for report, is shown by his query, at the hearing of December 10th, if there were any reasons then in existence why he should not file his report. Accordingly the referee, within 2 days, on December 12th,

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signed his report, and on December 15th, filed it, together with all the findings. As the case was not finally and conclusively submitted to him until December 10th, he had 60 days from that time in which to report; but, as stated, he signed his report and passed upon the findings within 2 days.

There was no ground, therefore, on December 14th, which authorized Mr. Coleman to elect to end the reference, and his notice is insufficient. The report which the referee filed is the report which he had made on June 30th, except that he changed the date thereof in consequence of the request of the parties that the findings might be submitted before the making of such report. This is not the case of a slothful and dilatory referee, but rather the case of a referee desirous of giving the parties every opportunity to settle or submit anything that in their judgment was material to their side of the case; and, instead of being commended for his conduct, it is made the basis for a charge of misconduct by the attorneys whom he was endeavoring to accommodate. The language of Judge Barrett, in *Dwyer v. Hoffman*, *supra*, is very pertinent in this connection:

"I am satisfied that the plaintiff's attorney was misled, and that the delay in taking up the report was really to accommodate the defendant, and substantially at his request and for his purposes. To deprive the plaintiff of the benefit of the entire litigation merely because he good naturedly gave defendant time to arrange some kind of a settlement, would be, not only an injustice, but, in my judgment, a very narrow, strained, and technical view of a statute which was simply intended to compel prompt and industrious attention to the case upon the referee's part."

Motion denied, with \$25 costs.

Tirpak v. Hoe.

ANDREW TIRPAK, RESPONDENT, v. ROBERT HOE
ET AL., APPELLANTS.*

SUPREME COURT, APPELLATE TERM, APRIL, 1907.

§§ 870, 873, 3189.

Discovery—Examination before trial—Physical examination.

Upon proof by affidavit that the defendants in an action for personal injuries are ignorant of the nature and extent of such injuries and of the manner in which they were caused, an order for the physical examination of the plaintiff's person and for his oral examination, as a party before trial, as to the manner in which his injuries were caused, will be granted under Code Civil Procedure, section 870, which permits the examination of a party before trial, and section 873, which provides that "in every action to recover damages for personal injuries, the court or judge, in granting an order for the examination of the plaintiff before trial, may, if the defendant apply therefor, direct that the plaintiff submit to a physical examination, * * * and such examination shall be had and made under such restrictions and directions as to the court or judge shall seem proper.

Discovery—Bill of Particulars.

An examination of plaintiff before trial, as permitted by Code Civil Procedure, section 870 and 873, will not be denied on the ground that the defendants might have procured the desired information by a bill of particulars.

Discovery—Effect of bad faith.

Bad faith alone can defeat the right of examination of a party before trial, provided the requirements of the Code of Civil Procedure and the General Rules of Practice have been complied with.

* See note at end of case.

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Appeal—Orders of New York City Court—Review.

Under Code Civil Procedure, section 3189, as amended by chapter 515 of the Laws 1902, the Supreme Court has full power to review discretionary orders of the City Court of New York City. (*Decided April, 1907.*)

Appeal by defendants from an order of the City Court of New York City modifying an order for the examination of plaintiff before trial. Reversed.

Mr. Edward G. Pringle, for appellants.

Messrs. Jones & Nekarda (L. B. Treadwell and R. W. Darling, of Counsel), for respondent.

GIEGERICH, J.—The action is to recover damages for a personal injury by reason of the alleged negligence of the defendants. The defendants procured an order for the examination of the plaintiff as an adverse party before trial, which included a provision for his physical examination. Among the affidavits upon which such order was made, the affidavit of Charles W. Carpenter sets forth, among other things, that the defendants are ignorant of the nature and extent of the injuries complained of, of the manner in which such injuries were sustained, and of other material facts within the personal knowledge of the plaintiff as to the manner in which the alleged injuries happened to the plaintiff. The order required the plaintiff to appear before the referee therein named to be examined as an adverse party before trial "concerning the nature, location, extent, and effect of the alleged injuries complained of in the complaint, and concerning the manner in which the said injuries were sustained, and concerning the other matters referred to in the said annexed affidavit of Charles W. Carpenter." The plaintiff subsequently applied for and obtained, notwithstanding the opposition of the defendants thereto, an order modifying the above-mentioned order by striking out the

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words "and concerning the manner in which said injuries were sustained, and concerning the other matters referred to in said affidavit of Charles W. Carpenter," thus restricting the oral examination to the nature and extent of the alleged injuries; and the defendants have brought on this appeal.

The motion to modify the order was based solely upon the papers upon which it was granted, but the defendants submitted affidavits in opposition. The notice of motion sets forth, and the order appealed from recites, two grounds of the application, viz., that the information sought on the general examination of the plaintiff as to the manner in which he was injured (1) is not within the purview of section 873 of the Code of Civil Procedure, but consists of matters to be passed upon by a jury, and not by a referee, and (2) could only have been ascertained by a bill of particulars.

As to the first ground, the affidavit of Mr. Carpenter states "that the defendants desire to take the deposition of the said Andrew Tirpak, the plaintiff herein, under and pursuant to the provisions of section 870 et seq. of the Code of Civil Procedure," and upon a reading of such order it will be seen that it directs the examination of the plaintiff as a witness before trial upon the matters indicated under section 870 of the Code, and a physical examination under section 873 of the Code. Such practice is directly sanctioned by the language of section 873 of the Code, which, so far as applicable, provides that:

"In every action to recover damages for personal injuries, the court or judge, in granting an order for the examination of the plaintiff before trial, may, if the defendant apply therefor, direct that the plaintiff submit to a physical examination, * * * and such examination shall be had and made under such restrictions and directions as to the court or judge shall seem proper."

The Court of Appeals in *Lyon v. Manhattan Railway*

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Company, 142 N. Y. 298, 305, construing these provisions, which were added by chapter 721, p. 1791, of the Laws of 1893, said:

"The statute has in terms provided that the physical examination shall be procured in the same way and as part of an examination of the party before trial; and in that way only, and by conforming to the general provisions of law on the subject, can the object and purpose of the amendment ever be attained. This construction gives effect to every word of the section as amended, and is in harmony with the other sections immediately preceding and following it. Then the referee becomes something more than a mere spectator at an idle ceremony. He may take the plaintiff's testimony upon the issue and report to the court as upon an examination before trial."

The doctrine of this case was followed and applied in *Lawrence v. Samuels*, 20 Misc. Rep. 278, 280, 45 N. Y. Supp. 743, where the Appellate Term, speaking through Mr. Justice Bischoff, said:

"The physical examination, which the statute renders available, may be procured only as an incident to the examination of a party before trial, and is subject to the general rules governing such an examination and the application therefor. Code Civ. Pro., sections 870, 872, 873; *Lyon v. Man. Ry. Co.*, 142 N. Y. 298, 305."

Under these authorities, the order for the physical examination of the plaintiff, as well as his oral examination regarding the manner of the accident, was, upon the facts disclosed, fully authorized; and hence the modification of the order, whereby the oral examination of the plaintiff is restricted to the physical injuries complained of, cannot be sustained upon the ground first considered.

The second ground assigned in the notice of motion and order of modification, viz., that the information sought could have been procured by a bill of particulars, is equally untenable. Even if the defendants might have obtained such in-

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formation in that way, which, however, the papers do not disclose, they were not limited to this method of obtaining it; but they had the right to obtain it by an examination of the plaintiff under an order for his examination as an adverse party before trial. *Dudley v. New York Filter Mfg. Co.*, 80 App. Div. 164, 80 N. Y. Supp. 529. In the case last cited the order was upheld, although a bill of particulars had already been furnished. Further authorities in support of the defendants' position will be found in the recent decisions of the Appellate Division of this Department in *Goldmark v. U. S. Electro Co.*, 111 App. Div. 526, 97 N. Y. Supp. 1078; *McKeand v. Locke*, 115 App. Div. 174, 100 N. Y. Supp. 704; *Hill v. McKane*, 115 App. Div. 537, 101 N. Y. Supp. 411. These cases have established a more liberal practice in reference to depositions before trial than has heretofore prevailed, and, briefly stated, hold that bad faith alone can defeat the right to an examination of a party before trial, provided the requirements of the Code of Civil Procedure and the general rules of practice have been complied with. There is no claim on the part of the plaintiff that the defendants have not conformed to such requirements.

The court below did not hand down an opinion, and the memorandum of the decision does not disclose the ground for the modification of the order and the granting of the order appealed from. It may therefore be assumed that the decision was based upon either one or both of the sole grounds referred to in the notice of motion. As seen, such modification cannot be sustained under the authorities above cited; nor have I been able, after careful examination, to discover any grounds upon which it can be sustained. The affidavit of Mr. Carpenter shows, without contradiction, that the defendants are ignorant of the facts concerning which they seek to examine the plaintiff, and therefore the scope of the examination provided for in the original order was proper, and such examination should not have been limited to the mere nature and extent of the plaintiff's injuries, but should have

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permitted inquiry into the manner of the happening of the accident.

It is also urged by the plaintiff that this court cannot review the exercise of discretion by the court below in restricting the oral examination of the plaintiff; but, upon examining the cases cited by him in support of such point, it will be seen that they were decided before section 3189 of the Code was amended by chapter 515, p. 1231, of the Laws of 1902, which provides that, upon an appeal from an order of the City Court, this court "shall have full power to review any exercise of discretion by the court or judge below."

The order appealed from should therefore be reversed, and the order for the examination of the plaintiff in its original form reinstated, with costs and disbursements to the appellants. All concur.

NOTE.—RIGHT TO EXAMINE PARTY BEFORE TRIAL WHEN INFORMATION OBTAINABLE BY BILL OF PARTICULARS.

A motion to vacate an order for the examination of the plaintiff before trial was granted in *Immig v. Haesloop*, 14 N. Y. Supp. 638. The court said that it was apparent from the affidavit that the answer will be a general denial and that any information given by the plaintiff will in no wise help the defendant in preparing his answer, and if the defendant desired a statement of the account he could obtain a bill of particulars. And in *Jiminez v. Ward*, 21 App. Div. 387, 47 N. Y. Supp. 557, an order denying a motion to vacate an order for defendant's examination before trial was reversed. This case was an action brought to recover a certain sum of money alleged to have been received by the defendant for the plaintiff. It appeared that all of the allegations on which the order was granted, except those as to the demand, were upon information and belief, and all of the information which it was alleged the plaintiff desired could have been obtained by a bill of particulars. The court

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said that so far as the papers disclose it would seem that the sole object of the plaintiff was to ascertain whether he has a cause of action or not.

In Tirpak v. Hoe, 39 N. Y. Civ. Pro. R. 68, the court held that it was no answer to an application for an examination before trial, under Code Civil Procedure, section 870 et seq., that the defendants might have obtained the information by a bill of particulars.

In Dudley v. New York Filter Mfg. Co., 80 App. Div. 164, 80 N. Y. Supp. 529, an order for the examination of the plaintiffs before trial was upheld, notwithstanding the fact that a bill of particulars had already been granted.

The authorities permit the granting of a bill of discovery to enable a party to frame a bill of particulars. McIlhanney v. Magie, 12 N. Y. Civ. Pro. R. 27; Cornish v. Wormser, 53 Hun, 40, 5 N. Y. Supp. 889; Ball v. Evening Post Pub. Co., 48 Hun, 149.

JOHN HORAN, APPELLANT, v. HENRY BRUNING
RESPONDENT.*

SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT, DECEMBER, 1906.

§§ 452, 723.

Parties—Bringing in Third Party in action to recover money judgment.

Code Civil Procedure, section 452, providing that "the court may determine the controversy, as between the parties before it, where it can do so without prejudice to the rights of others, or by saving their rights; but where a complete determination of the con-

* On the construction of section 723 of the Code as to the amendment of pleadings changing the capacity of a party, see exhaustive annotation, 38 N. Y. Civil Pro. 13.

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trover cannot be had without the presence of other parties, the court must direct them to be brought in," relates primarily to equitable actions and gives the court no authority to compel or allow the plaintiff in an action in which a money judgment only is sought, as an action for personal injuries. Same.

Code Civil Procedure, section 723, which provides that in the furtherance of justice, the court may, upon the trial or at any other stage of the action, before or after judgment, "amend any process, pleading, or other proceeding, by adding or striking out the name of a person as a party, or by correcting a mistake in the name of a party," does not authorize the court in an action to recover money only, such as damages for personal injuries, to allow the plaintiff to bring in a third party as a defendant on the ground that he was in some way responsible for the accident. (*Decided December, 1906.*)

Appeal from an order of the Supreme Court of New York County setting aside an order authorizing plaintiff in an action for negligent injuries to bring in a third party. Affirmed.

Messrs. Frank A. Acer and Arthur Ofner, for appellant.

Mr. Henry L. Maxson, for respondent.

HOUGHTON, J.—The action is in negligence for personal injuries, and was originally brought against the defendant Anderson alone, and issue joined by service of an answer by him. Thereafter the plaintiff learned facts which led him to believe that the respondent Bruning was also guilty of some act which led to the accident, and without notice to him he obtained an order making him a party defendant, with leave to serve a supplemental summons and complaint upon him. Bruning appeared specially and moved to set aside such order, on the ground that the court had no authority to make it, which motion was granted; and from the order made thereon the plaintiff appeals.

There is some confusion of authority as to whether the court has power in a simple action at law, where a money

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judgment alone is sought, to permit a plaintiff to bring in third parties as additional defendants to his action; but we think the weight of authority and reason is that he has not, and that the order appealed from is right, and should be affirmed. The Fourth Department, in *Heffern v. Hunt*, 8 App. Div. 585, 40 N. Y. Supp. 914, held that the court had no power to add as a party defendant an alleged joint tort-feasor not originally made a party; and the Second Department, in *Schun v. Brooklyn Heights Railroad Company*, 82 App. Div. 560, 81 N. Y. Supp. 859, held that it had in a negligence action, but that an order adding a defendant in a replevin action was unjustified (*Goldstein v. Shapiro*, 85 App. Div. 83, 82 N. Y. Supp. 1038); and the Third Department, in *Ten Eyck v. Keller*, 99 App. Div. 106, 91 N. Y. Supp. 169, in an action for conversion, held that no such power existed.

Whatever power there is in the court is derived from sections 452 and 723 of the Code of Civil Procedure. Section 452 of the Code relates primarily to equitable actions (*Rosenberg v. Salomon*, 144 N. Y. 92), and that section gives the court no authority to compel the plaintiff, in an action in which a money judgment only is sought, and in which the title to no real property or specific or tangible personal property is involved, to bring in as a defendant a third party, even on his own application. *Bauer v. Dewey*, 166 N. Y. 402; *Long v. Burk*, 105 App. Div. 457, 94 N. Y. Supp. 277. If, therefore, the court has any power, in an action at law in which a money judgment alone is demanded, to bring in a third party as a defendant, it must be found in section 723 of the Code. That section provides that, in furtherance of justice, amongst other things, the court may, upon the trial or at any other stage of the action; before or after judgment, "amend any process, pleading, or other proceeding, by adding or striking out the name of a person as a party, or by correcting a mistake in the name of a party.

The scope and meaning of the provision of the section quoted has been long before the courts, for almost the pre-

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cise language is found in section 173 of the Code of Procedure of 1862. The prevailing and dissenting opinions in *New York Milk Pan Co. v. Remington's Agricultural Works*, 25 Hun, 475, review the various decisions of the courts made up to the time they were written. The defendant in that case was a corporation, and service had been made upon an officer, who was also a copartner with two others dealing under the name of the Remington Agricultural Company, which copartnership had taken over the contract from the corporation defendant upon which action was brought. Upon discovering the situation the plaintiff moved to substitute the officer upon whom he had served individually for the corporation defendant, and to add his two other partners as defendants. The General Term concluded that, inasmuch as one of the partners had been served, the court had power to do this. The Court of Appeals reversed the case (89 N. Y. 22), and held that such an act was not within the scope of section 723 of the Code, and that no such power existed. While in that case there was a virtual changing of defendants, which is not the situation in the present case, the decision illustrates the fact that the section does not give power to the court to grant every kind of an amendment, notwithstanding justice may be subserved thereby.

In *Chapman v. Forbes*, 123 N. Y. 532, the action was for money had and received through one Breen as plaintiff's agent. The defendant admitted receiving the money, but pleaded that it belonged to Breen, and that Breen's assignee had brought action against him to recover it, and moved that such party be made codefendant, and his motion was granted against plaintiff's protest; but the Court of Appeals said such order was unauthorized. It is true that in this case and in that of *Bauer v. Dewey*, *supra*, section 723 of the Code is not referred to; but it existed, and all of its broad provisions were in force, and, if either order could have been sustained under the provisions of that section, presumably neither of them would have been reversed, for

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both were in furtherance of justice and the quieting of litigation.

There seems to be no more reason for dragging in a third party as a defendant against his protest than for refusing to permit him to come in against the protest of the plaintiff. If there is no power to let him come in, there is no power to compel him to do so. It is true that the plaintiff could have sued the appellant when he brought his action against the other defendant. It is also true that he could select such of several tort-feasors as he saw fit and bring action against them. In an action for personal injuries occasioned by the negligence of several persons, there is a separate liability as well as a joint one, and the person injured may, at his election, sue both or either of the wrongdoers; and there is no rule which makes all of them necessary parties to an action of that character. *Creed v. Hartmann*, 29 N. Y. 592. The plaintiff selected one, and he cannot be permitted to add others as often as he likes, or as often as he discovers some facts which lead him to believe that some one else brought about his injury. The question is quite distinct from the power to amend as to the name of a party, or to eliminate or add words respecting official or representative capacity in which the party sues or is being sued. In those cases the party is before the court as it was originally brought.

The order should be affirmed, with \$10 costs and disbursements.

PATTERSON, P. J., and CLARKE, J., concur.

INGRAHAM, J. (dissenting).—The action was commenced against Frithiof Anderson as sole defendant to recover damages for a personal injury by the service of a summons and complaint on the 4th day of August, 1905. On the 6th day of April, 1906, on application of the plaintiff, consented to by the defendant, an order was entered allowing the plaintiff,

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within 30 days from the date of the order, to serve a supplemental summons and amended complaint, a copy of which was annexed to the application, upon Henry Bruning, then making him a defendant in the action. On the 7th day of April, 1906, the supplemental summons and amended complaint was served upon Bruning, and he thereupon became a defendant in the action. Subsequent to such service he appeared in the action for the purpose of moving to set aside the order authorizing the service of the supplemental summons and amended complaint. That motion was granted and the plaintiff appealed.

The original order allowing the plaintiff to amend the summons and complaint was authorized by section 723 of the Code of Civil Procedure. That section provides that:

"The court may, upon the trial, or at any stage of the action, * * * and on such terms as it deems just, amend any process, pleading or other proceeding, by adding or striking out the name of a person as a party, or by correcting a mistake in the name of a party, or a mistake in any other respect, or by inserting an allegation material to the case."

The parties to the action having consented to the amendment of the summons and complaint, the party joined became a party to the action to the same effect as if he had been originally made a party. It is quite probable that this added defendant does not want to be sued; but, when the amended or supplemental summons and complaint was authorized by the court on the consent of all parties to the action, the action as against this added defendant was the same as though he had originally been made a defendant, and I do not see that he had any more right to complain than he would have had if he had been originally joined in the action. An entirely different question would be presented if one of the original parties to the action had objected to the proposed amendment.

Several cases are cited to sustain the order appealed from, but I do not think they apply. In *Heffern v. Hunt*, 8 App. Div. 585, 40 N. Y. Supp. 914, one of the original defendants

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objected to the proposed amendment, and it was there held that an original party defendant had a right to appeal from such an order, and that upon his objection it should not have been granted. In *Goldstein v. Shapiro*, 85 App. Div. 83, 82 N. Y. Supp. 1038, the action was in replevin, and the motion to bring in the third party was made on the motion to him, and upon an appeal from the granting the motion by the third party it was held that in such an action, if made a party to that action, he was deprived of the benefit of section 1709 of the Code of Civil Procedure; and attention was there called to the case of *Schun v. Brooklyn Heights R. R. Co.*, 82 App. Div. 560, 81 N. Y. Supp. 859; which authorized the court to make a third party the defendant in an action to recover for negligence, but it was held that that case did not apply because of the peculiar character of the action of replevin. The point does not seem to have been raised in that action as to the right of a third party to raise the question, and that point was not considered: the decision being based entirely upon the nature of the action. In *Ten Eyck v. Keller*, 99 App. Div. 106, 91 N. Y. Supp. 169, the original defendant objected to the order, and he appealed. On the other hand, such an order is expressly approved by this court in the Second Department in *Schun v. Brooklyn Heights R. R. Co.*, 82 App. Div. 560, 81 N. Y. Supp. 859; and I think it fully justified by the Code and practice. The action was commenced as against the added defendant when the amended or supplemental complaint was served upon him. Any defense, including the statute of limitation, would be as available to him as if the action had been commenced when the amended or supplemental summons and complaint was served. It is the policy of the law that a litigation of this kind should be settled in one action, and I can see no reason why the plaintiff should not have the right to bring the action against such defendants as he may select, so long as the parties to the action, as originally commenced, have no objection.

For this reason I think the order appealed from should be

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reversed, with \$10 costs and disbursements, and the motion denied, with \$10 costs.

McLAUGHLIN, J., concurs.

MATTER OF LAKE SHORE AND MICHIGAN SOUTHERN RAILROAD CO.

SUPREME COURT, SPECIAL TERM, ERIE COUNTY, FEBRUARY, 1907.

§§ 721, 3368.

Damages—Eminent domain—One proceeding.

The entire damages to be paid to the owners of land sought to be taken by condemnation proceedings should be ascertained in one proceeding.

Eminent domain—Amendment of petition.

A petition in condemnation proceedings may be amended so as to include the assessment of damages covering the fee of the land in the highway, as permitted by Code Civil Procedure, section 721 et seq., which is made applicable to condemnation proceedings by section 3368, in cases where it appears during the condemnation proceedings that such interest is a part of the land sought to be taken.

(Decided February, 1907.)

Application to amend petition in condemnation proceedings so as to embrace fee in highway. Granted.

Mr. Thomas D. Powell, for motion.

Mr. E. C. Randall, opposed.

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WHEELER, J.—The land proposed to be taken consists of a strip of land some 1825 feet in length by 20 feet wide at one end, and some 43 feet at the other, adjoining the petitioner's right of way. A highway runs across the strip, and it now appears that the parties defendant to this proceeding own the fee of the highway, although the petition in describing the parcel to be taken excepted so much of the premises described "as is included within the lines of the highway." The affiants disclose that the highway was excepted because the petitioner's attorney was misled by the official search into the belief the defendants had no title to the highway, but that the mistake has since been discovered, and an amendment is now asked so as to include in the description of the property to be condemned the highway itself.

It goes without argument that the entire damage to be paid the owner should be ascertained in one proceeding and the petitioner not driven to institute a separate and distinct proceeding for the mere fee in the highway, and this application should not be denied if the court has the power to grant it. The power of the court to allow this amendment, however, is challenged by the counsel for the owner. Section 3368 of the Code of Civil Procedure makes section 721 applicable to condemnation proceedings, and this section is very broad in its provisions, and authorizes amendments where the adverse party has not been prejudiced. We cannot see how the owners can be prejudiced by the amendment. In the case of the Prospect Park & Coney Island R. R. Co., 67 N. Y. 378, an amendment was allowed by which a strip of land of less width than originally described was substituted, and the court said that under the circumstances of that case a further attempt at an agreement on price did not appear necessary. The affidavits presented in this case show that the negotiations with the owners related to all their interest in the strip, that in the highway as well as that on either side. So the owners cannot be said to be prejudiced.

If an amendment for a less quantity of land be permissible,

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I cannot see why an amendment embracing the fee of the land in the highway cannot also be brought in by amendment. The owner cannot possibly be prejudiced by such an amendment where the commissioners have not yet made their award, and, if necessary, the testimony before them may be begun *de novo*. This amendment, however, must be upon terms. It appears that an injunction action is pending, brought by the owners against the petitioner, to restrain it from entering on the land within the highway. It also appears that in this proceeding the petitioner obtained an order permitting it to go into immediate possession on depositing \$5,000, which has been done. As the effect of this amendment and an award under it will operate to practically terminate the action for an injunction, as a condition of permitting the amendment, the petitioner must pay all taxable costs to date in the injunction action. It must also pay all witness' fees paid and taxable on the part of the owners in their proceeding to date, and also \$50 to the owners' counsel or attorney for opposing this motion and as compensation for his appearance before the commissioners in this proceeding to date.

Let an order be entered accordingly.

DANIEL McNAMARA, RESPONDENT, v. S. ORMOND GOLDAN, APPELLANT.

SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT, MARCH, 1907.

Pleading—Libel—Facts must be stated.

In an action for libel, the plaintiff must allege facts from which the conclusion that the words are libelous may be drawn.

Pleading—Libel—Sufficiency of allegations.

A complaint in an action for libel alleging that the defendant charged plaintiff with sending anonymous letters and merely characteriz-

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ing them as obscene, is not an allegation of fact, but a conclusion, and insufficient.
(*Decided March, 1907.*)

Appeal by defendant from a judgment of the Supreme Court, overruling a demurrer to a complaint in an action for libel. Reversed.

Mr. Levin L. Brown, for appellant.

Mr. Joseph N. Tuttle, for respondent.

LAMBERT, J.—The complaint alleges that the defendant “falsely, wickedly, and maliciously” composed and published, and caused and procured to be published of and concerning this plaintiff, the following letter:

“New York, Sept. 12, 1905.

“The Rev. Father John Collins, Fordham, St. John’s College, New York City—My dear Sir: When with Mr. McNamara I last saw you, you informed us that you would interview the young man as to the anonymous letters [the defendant thereby referring to, and writing of, certain obscene letters received by various persons through the mails and well known to said Father Collins and others to have been so received], and that if there was any further complaints he would be discharged from your institution. Since this time this man has been sent for by the postal authorities, and voluntarily wrote for them, thereby disclosing the authorship of all the anonymously written letters [referring to said obscene letters]. At this time all letters [referring to said obscene letters] stopped for a time, only to begin again after the matter had in a sense quieted. These letters [referring to said obscene letters] are still being written; three have been received by different persons two weeks ago, and two yesterday. I have now evidence which proves conclusively that the man in your institution,

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and no one else, is actually writing these letters [referring to said obscene letters], though, no doubt, others are inspiring some of the contents. While one of the assistant district attorneys stated that it was a moral certainty as to who wrote these letters [referring to said obscene letters], still there was not sufficient evidence to proceed against him criminally. This evidence is, however, sufficient, I believe, for you to take some action upon, even if it involved this man's discharge, which possibly might result in stopping the vile practice. Please understand that both Mr. McNamara and myself are absolutely dispassionate in the matter. The man is certainly an entire stranger to me and practically so to Mr. McNamara, but, having shown himself as the author of these letters [referring to said obscene letters], I feel that you will agree with others and myself that he should be punished. Trusting with your kind help, we may succeed in at least stopping this practice, I am,

“ Most sincerely yours, J. Ormond Goldan.”

The complaint then alleges that the “ defendant, by composing and publishing and causing to be published the above letter, meant and charged that this plaintiff had been and was guilty of the crime of sending obscene letters through the mails.” The defendant demurred to the complaint upon the ground that it did not state facts sufficient to constitute a cause of action; and, from the interlocutory judgment overruling the demurrer, the defendant appeals to this court.

The rule, supported by a long line of authorities, in actions for libel, requires something more than allegations of conclusions of fact. The facts themselves must be alleged from which the conclusion may be drawn. In a case like the present it is not enough to characterize the anonymous letters mentioned; but the contents of such letters must be set forth in order that it may appear on the face of the pleadings that they are of the character charged. People

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v. Danihy, 63 Hun, 579, 581, 18 N. Y. Supp. 467, and authorities there cited. The letter set out in the complaint merely alleges that some one has been writing and sending anonymous letters. The mere characterizing of such letters as obscene by the pleader is not an allegation of fact, but a conclusion from facts, none of which are shown to exist. Writing and sending anonymous letters is not a crime. Such letters might be entirely innocent. It is only when they are in fact obscene that the writing and mailing of them becomes a crime, and the facts from which the conclusion is to be drawn should appear in the pleadings.

For this reason, we think the facts do not constitute a cause of action, and the interlocutory judgment should be reversed with costs, and the demurrer sustained, with costs, with leave to plaintiff to amend complaint upon payment of said costs. All concur.

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NEW YORK CITY COURT, SPECIAL TERM, JANUARY, 1907.

§§ 2269, 2280, 2281, 2283.

Contempt—Election of penalty—Discretion of Court.

Code Civil Procedure, section 2269, provides two ways for the enforcement of penalties for contempt for failure to appear in supplementary proceedings,—either by an order to show cause, or by a warrant of attachment; parties must select their course of procedure, but the discretionary power of the court to direct the appearance of the debtor is not limited by such election.

Contempt—Right to hearing.

Code Civil Procedure, sections 2280, 2281, and 2283, do not require the court, upon the default of one cited to show cause why he should not be punished for failure to comply with an order in supplementary proceedings, to determine that he is guilty of contempt, without a hearing.

(Decided January, 1907.)

Matter of Najez. •

Motion for an order of commitment. Denied.

Mr. Nathan S. Levy, for judgment creditor.

WADHAMS, J.—The judgment creditor insists that he is entitled to an order that the judgment debtor be committed to the county jail and there imprisoned until he performs certain acts specified in the order, and until a fine of \$250 and \$38.81 costs in addition be paid. An order to examine the judgment debtor in proceedings supplementary to execution was issued, and upon the return day a default was noted. Subsequently an order to show cause why the judgment debtor should not be punished for contempt was obtained, and upon the return day, the judgment debtor having failed to appear, the court determined that "attachment may issue, returnable forthwith and bailable in \$200."

It has been the humane practice of justices of this court, in cases of default upon motions to punish for contempt, not to issue an order for the commitment and detention of a judgment debtor, but to permit a bailable attachment returnable forthwith. The purpose and advantage of this practice are clear. The sheriff brings the debtor into court to answer before final determination of the motion to punish for contempt. It often appears upon his examination that the debtor never received the process which it is alleged he has disobeyed, or that the copy served was defaced or illegible. Many times the debtors are of foreign birth and unable to understand the process. Often satisfactory explanation of the failure to attend is given. An examination may then be directed, and an opportunity given the debtor to purge himself of the contempt or a proper and just penalty imposed. The practice of directing that the debtor be brought into court before he is committed is a check upon the zeal sometimes too readily shown by attorneys to use an alleged contempt of court as a basis for the collection of debt by imprisonment. For many years an enlightened public policy

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has looked with disfavor upon such process, and the practice of permitting attachment instead of a commitment to prison is in accord with such policy. The authorities submitted do not limit the power of the court to direct this method of procedure.

Under section 2269 of the Code of Civil Procedure there are two ways to proceed to enforce penalties for contempt—either by an order to show cause or by a warrant of attachment. Parties must elect their course of procedure and be governed by such election in all subsequent stages of the proceeding (*People ex rel. Post v. Grant*, 3 N. Y. Supp. 142); but the discretionary power of the court to direct the appearance of the debtor is not limited by such election. When the warrant of attachment is returned, the court must determine upon the original affidavits, the answers, and subsequent proofs whether the accused has committed the offense charged. Section 2280, Code Civ. Pro. Upon the return of an order to show cause it is provided by sections 2281 and 2283 that the questions which arise must be determined, and if it is determined that the accused has committed the offense charged, and that it defeated, impaired, impeded or prejudiced the rights or remedies of a party, the court must make a final order directing that he be punished by fine or imprisonment, or both, as the nature of the case requires, and that a warrant or order of commitment must issue accordingly. It will be noticed that the court is to issue the final order only after determination that the offense has been committed. There is nothing in the Code provisions nor in the authorities which requires the court, upon a default and without hearing the accused, to determine that he has committed contempt of court. The very purpose of directing that the creditor proceed by attachment, which brings the debtor before the court, is to enable the court to make a proper and just determination.

The attachment may therefore issue. The application for an order of commitment at this time is denied.

Dodge v. Albers.

F. W. DODGE CO., PLAINTIFF, v. HENRY F. ALBERS,
DEFENDANT.

NEW YORK CITY COURT, SPECIAL TERM, JANUARY, 1907.

§§ 26, 52, 53, 2462.

Supplementary proceedings—Resignation of judge—Jurisdiction.

An order in supplementary proceedings is not defective and the court does not lose jurisdiction of the proceedings, by the resignation of the judge who signed the order, since Code Civil Procedure, section 26, provides that a special proceeding instituted before a judge of a court of record in the city of New York may be continued before another judge of the same court as if instituted before him, and sections 52 and 53 provide that in case of sickness, death, or resignation of an officer in whose court a special proceeding had been instituted, such proceedings may be continued before his successor as if it had originally been instituted before him, and section 2462 makes sections 26 and 52 applicable to a special proceeding.

(Decided January, 1907.)

Motion to vacate an order directing the examination of a judgment debtor in supplementary proceedings. Denied.

Mr. John P. Herren, for plaintiff.

Mr. George B. Hayes, for defendant.

WADHAMS, J.—Motion is made to vacate an order heretofore granted in this court by Mr. Justice Seabury, directing the examination of a judgment debtor in proceedings supplementary to execution. It is contended that the order is defective, in that it directs "the judgment debtor to attend before me, a justice of the City Court of the City of New York."

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The order continues :

" At a Special Term thereof, held at the chambers in the Brownstone Building, No. 32 Chambers street, in the city of New York, borough of Manhattan, on the 25th day of January, 1907, at 10 o'clock in the forenoon, and on such further days as the court shall name to be examined concerning his property."

Mr. Justice Seabury had resigned and was not a justice of the City Court of the City of New York upon the return day of the order. The contention is that the court has lost jurisdiction by reason of the resignation, inasmuch as the order directed attendance before the justice who had resigned.

In my opinion the provisions of the Code of Civil Procedure clearly continue the jurisdiction of the court upon such event, and the order is sufficient to require the judgment debtor to attend before another justice of the same court (in this instance the successor to the justice who signed the order), sitting at the same term of the court and at the time and place designated in the order. Code Civil Pro., sections 26, 52, 53, 2462. In *Gamman v. Berry*, 34 Hun, 138, it was held, Mr. Justice Haight writing for the General Term, that an order in proceedings supplementary to execution, made by a county judge whose term of office expired after the making of the order and before the return day, and returnable before him was valid.

The motion is denied, with \$10 costs, and the judgment debtor will be directed to attend for examination as may be designated in the order herein. Settle order on notice.

FRANCIS WILSON, RESPONDENT, v. SAMUEL COLLINS, APPELLANT.

SUPREME COURT, APPELLATE DIVISION, SECOND DEPARTMENT, APRIL, 1907.

§ 557.

Arrest—Fraud—Sufficiency of affidavit.

An affidavit used to obtain an order of arrest in an action based on fraud in the sale of a picture, is insufficient under Code Civil Procedure, section 557, requiring proof by affidavit that a sufficient cause of action exists against the defendant, in which affiant states of his own knowledge that he purchased the picture of the defendant, relying upon the representation that it was made by a certain well-known artist and that the defendant made such representation with knowledge of its falsity and with intent to deceive and defraud the plaintiff, since the affiant is not an expert and does not personally know who painted the picture. (*Decided April, 1907.*)

Appeal by the defendant from an order of the Special Term of Westchester County denying his motion to vacate an order of arrest. Reversed.

Messrs. R. Floyd Clarke and Bela D. Eisler (Francis S. Turner and Robert Goeller, on the brief), for appellant.

Mr. William D. Leonard, for respondent.

MILLER, J.—The defendant appeals from an order denying a motion to vacate an order of arrest, and asserts that the affidavit upon which said order of arrest was granted is insufficient.

Wilson v. Collins.

The action is for fraud. To obtain the order of arrest the plaintiff swore, as of his own knowledge, that he purchased of the defendant an oil painting, relying upon the representation that it was made by a well-known and celebrated Dutch artist named Mauve, and that the defendant made said representation with knowledge of its falsity and with intent to deceive and defraud the plaintiff. It is claimed that the plaintiff could not have had personal knowledge of all the facts sworn to, and that therefore the affidavit is entitled to no more force than if sworn to on information and belief. When the plaintiff purchased the picture, he supposed that it was painted by Mauve. It is impossible to see how he can now personally know who painted it, or what knowledge the defendant had on the subject. He does not pretend to be an expert, and he makes the statement as a fact, and not as an opinion. If we had proof of the facts from which the plaintiff makes the deduction sworn to, we might or might not be able to make the same deduction. Section 557 of the Code of Civil Procedure requires proof by affidavit that a sufficient cause of action exists against the defendant. Where the affiant cannot have had actual knowledge of the facts sworn to, his recklessness in swearing cannot obviate the necessity of furnishing proof of the facts and circumstances from which the court can draw the necessary conclusion.

The order should be reversed, and the motion granted.

Order reversed, with \$10 costs and disbursements, and motion granted, with costs. All concur, except HOOKER and RICH, JJ., who dissent.

Kamber *v.* The Ben Franklin Transportation Co.

BERNARD KAMBER, PLAINTIFF, *v.* THE BEN
FRANKLIN TRANSPORTATION CO., DEFENDANT.

SUPREME COURT, SPECIAL TERM, NEW YORK COUNTY,
FEBRUARY, 1907.

§ 803 ET SEQ.

Discovery—Inspection of books.

In an action against a carrier for failure to deliver goods intrusted to it for transportation, where the defendant alleges delivery of the goods in pursuance of plaintiff's written order, which the latter claims he never signed or authorized, the plaintiff should be permitted, under Code Civil Procedure, section 803 et seq., to inspect, copy, and photograph such order and inspect and copy the entries in defendant's forms and books relating to the receipt and transportation of the goods.

Discovery—Notice of substitution of attorneys.

The failure of the plaintiff to notify the defendant of a prior substitution of attorneys, is not a valid objection to an application to inspect books and papers, under Code Civil Procedure, section 803 et seq.

(Decided February, 1907.)

Motion for an inspection of books and papers. Granted.

Mr. Tobias H. Keppler, for the motion.

Mr. Maurice J. Katz, opposed.

GIEGERICH, J.—The action is brought to recover the value of goods intrusted by the plaintiff to the defendant for transportation, but which the defendant failed to deliver. Among other things, the answer alleges that the defendant delivered

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the goods to an expressman who presented an order therefor signed by plaintiff. Such an order the plaintiff asserts he never signed nor authorized, and he makes this motion to be permitted to inspect, copy, and photograph such order, to the end that he may be prepared, with the testimony of experts in handwriting and otherwise, to meet such evidence upon the trial. He also asks to inspect and copy the defendants forms and books, so far as the same contain entries relative to the receipt and transportation of the goods in question.

In resisting the motion the defendant cites a large number of cases, most of which relate to motions for examination before trial. Others, like *Phillips v. Curtis*, 70 App. Div. 551, 75 N. Y. Supp. 581, show attempts to rove through a defendant's private papers in the hope of discovering something to the plaintiff's advantage. But in this case the plaintiff seeks only to see the records of the defendant's transactions with him, and concerning the single matter in dispute, and to see and photograph a paper claimed to have been signed by him. The plaintiff's right to what he asks is manifest as a matter of fairness, and is abundantly established by the authorities. *Umfreville v. Man. Ry.*, 46 App. Div. 594, 62 N. Y. Supp. 20; *Bamberger v. U. S. Fidelity & Guaranty Co.*, 37 Misc. Rep. 512, 75 N. Y. Supp. 1005; *Moore v. Encyclopædia Britannica Co.*, 43 Misc. Rep. 618, 88 N. Y. Supp. 133; *Rhoades v. Schwartz*, 52 App. Div. 379, 65 N. Y. Supp. 111.

The defendant also raises the point that, although the order substituting the plaintiff's present attorney in place of his prior one was served, there was no notice nor service of the earlier order substituting such prior attorney in place of the original attorney who commenced the action. I cannot see that this fact affects the defendant. The order served sufficiently shows the authority of the present attorney, as between the plaintiff and the defendant.

Motion granted, with \$10 costs.

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IDA D. EISENBERG, APPELLANT, v. MARY C. LAPE,
RESPONDENT.

COUNTY COURT, SARATOGA COUNTY, JANUARY, 1907.

§§ 2969, 2971, 2975, 2980, 2987, 3404.

Courts—Justice of the Peace—Jurisdiction.

A justice of the peace has no power under the Code of Civil Procedure to try a civil case before a jury in an adjoining town where he has an office, even though he act with the consent of the parties. (*Decided January, 1907.*)

Appeal by plaintiff from a judgment rendered before a justice of the peace in favor of defendant. Reversed.

Mr. William Rooney, for appellant.

Mr. A. T. Blessing, for respondent.

ROCKWOOD, J.—The principal question involved in this appeal relates to the jurisdiction of the justice of the peace, Burton D. Esmond, Esq., who qualified and is acting as a justice of the town of Ballston, in the county of Saratoga, N. Y. The village of Ballston Spa is located in the town of Ballston and Milton. Mr. Esmond resides in the town of Ballston, and for the sake of convenience has his office in that portion of the village of Ballston Spa lying within the town of Milton. After the joinder of issue in this action, the defendant demanded a jury trial; and the justice drew such jury at his residence in the town of Ballston. The venire was made returnable at the office of the justice in the town of Milton. Subsequently, the parties all being in court, adjournment was taken by consent to the office of the justice, where a jury trial was had and a verdict rendered of no cause of action, from which judgment appeal has been taken by the plaintiff to this court.

Counsel for the appellant challenge the power of the justice to adjourn the trial, even by consent, to a town other than that for which he was elected and qualified, asserting that the justice was without jurisdiction to try a civil case or render a valid judgment in any town except the town of Ballston. A justice of the peace is a constitutional officer. Const. art. 6, § 17. While in the early English statutes, and many of the decisions in this country, such magistrate is referred to as a county officer (see *Gurnsey v. Lovell*, 9 Wend. 319; *Lyme v. East Haddam*, 14 Conn. 394; *Lynch v. Vermazen*, 61 Iowa, 76; *Gage v. Clarke*, 51 N. J. Law, 97), still the later decisions, particularly those in New York state, describe him as a "town officer," who "can have no existence as a public officer independent of his town organization" (*Matter of Gertum v. Board of Supervisors*, 109 N. Y. 170; *People v. Garey*, 6 Cow. 642; *People v. Morrell*, 21 Wend. 563; *Ziegler v. Corwin*, 12 App. Div. 60, 42 N. Y. Supp. 855. In the case last cited the Appellate Division of the Fourth Department, in an elaborate opinion by Judge Ward, reviewed and commented upon the authorities relating to the constitutional jurisdiction of a justice of the peace. The conclusion of the court concerning the point now under consideration is briefly summarized in the following language:

"If he is a justice of the peace of a town he is a town officer, whose method of election and term of office is fixed by the constitution itself."

As a town officer a justice of the peace has well-defined powers and duties, being limited, however, to such as are given him by statute. In the exercise of his jurisdiction he may issue certain process, which runs throughout the county and elsewhere under certain conditions. He may issue a subpoena to compel a witness to attend in the county where the justice resides or an adjoining county (Code, § 2969); he may issue an attachment against a defaulting witness (Code, § 2971); he may direct a delinquent witness

in an adjoining county to be arrested and brought before him (Code, § 2975); and he may award a commission for the examination of a witness upon interrogatories without the county (Code, §§ 2980, 2987). In an action to enforce a mechanic's lien against real property brought before a justice of the peace, the summons and verified complaint may be personally served upon the owner anywhere within the state (Code, § 3404); and, if personal service cannot be so made, it can be effected by leaving a copy thereof at the last place of residence of the owner and by publishing a copy of the summons in a newspaper (Code, § 3405). In short, a justice of the peace is vested with ample powers to facilitate the trial of an action or proceeding pending before him, and the general tendency of modern legislation has been to amplify such powers to a considerable extent. A careful examination of the authorities has, however, failed to reveal any precedent, based upon either statute or principle, which will permit a justice of the peace to try a civil action, similar to the one at bar, except within the territorial limits of his jurisdiction. The Revised Statutes originally provided that:

"Justices of the peace must reside in the town for which they were chosen and shall not try a civil case in any other town except in cases otherwise provided by law." 1 Rev. St. (5th Ed.), pt. 1, c. 5, tit. 1, § 10.

While this section has been repealed by the public officers law and is not now in force, it is still illustrative of the early trend of authority upon the subject. In *People ex rel. Newell v. Montgomery Common Pleas*, 18 Wend. 649, the first judge of the county, as he was then called, when absent from his county and in the county of Albany, signed an allowance of appeal from the judgment of a justice of the peace. A motion was made to quash the appeal, which was granted; the court deciding:

"The judge had no jurisdiction to allow the appeal; it was a judicial act, which could properly be performed only in the county for which he was appointed."

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In a Texas case (*Foster v. McAdams*, 9 Tex. 542) it was held that a justice could not legally try a case out of his own precinct, even by consent of the parties. In *Gurnsey v. Lovell*, 9 Wend. 319, it was held in effect that a justice of the peace is not limited in the exercise of any official act which he is authorized to perform to the town to which he was chosen "except in the trial of civil causes." See, also, *People v. Morrell*, 21 Wend. 563. While both of the cases last cited were decided while the section of the Revised Statutes above quoted was in force, the general force of the legal principle seems to have been incorporated into section 2868 of the Code of Civil Procedure, which reads in part as follows:

"A justice of the peace must hold within his town or city a court for the trial of any action or special proceeding of which he has jurisdiction," etc.

There is no express or implied authority for a justice to try a civil case outside of the town for which he was elected, but it is asserted in this case that the parties expressly consented to try the issue in the town of Milton. It is elementary that jurisdiction cannot be conferred or extended by consent where it does not originally exist, and the powers of a justice of the peace in civil actions and special proceedings are expressly limited to such jurisdiction "as is specially conferred upon him by statute" and no other. Code Civ. Pro., § 286. If the justice of the peace could, by consent of parties, try the case in the town of Milton, then it follows that he could, by a similar consent, try a civil case in any town of the county, taking the jury with him from the town of his residence. The law does not contemplate that a justice of the peace may summon a jury from the town of his elective jurisdiction and then adjourn to some other town in the county for trial. Such a procedure, although perhaps convenient for the justice and litigants appearing before him, would lead to confusion and is apparently contrary to all authority in the State of New York. As the magistrate had

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no jurisdiction to try a civil case beyond the territorial limits of his own jurisdiction, it follows that he was without power to enter judgment, and the consent of the parties added nothing to the force of what was done.

The conclusion herein arrived at will probably work considerable inconvenience in the village of Ballston Spa, which is located in both of the towns of Ballston and Milton. It is better, however, that such inconvenience should be suffered than that there should be any departure from orderly procedure in the trial of causes. The judgment must be reversed, for the reason that the justice was without jurisdiction to try the case in the town of Milton or to enter judgment therein. As the position of the appellant, who expressly consented to the trial in the town of Milton and litigated the matter there fully before the justice and a jury, is of an extremely technical character, and as the respondent evidently consented to the change of the place of trial in the honest belief that no legal error was committed, it would, it seems to me, impose an unusual hardship in this case to award costs to the appellant. In addition to these reasons, it was stated upon the argument, and is generally conceded, that it has been the custom for some time in the town of Ballston for justices to adjourn for the convenience of parties and by consent to the town of Milton for trial. The business section of Ballston Spa is located in the town of Milton, and the law offices of the village are also in said town. This custom, continued for some time, has evidently mislead attorneys and litigants into the belief that it was proper, and the objection taken upon this appeal is the first to which the court's attention has been called.

Reversal is therefore directed for the error of the justice, and, in accordance with subdivision 2 of section 3066 of the Code of Civil Procedure, such reversal is without costs to either party as against the other.

Judgment reversed, without costs to either party.

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PEOPLE OF THE STATE OF NEW YORK, APPELLANT, *v.* TROY CHEMICAL CO., RESPONDENT.

SUPREME COURT, APPELLATE DIVISION, THIRD DEPARTMENT, MARCH, 1907.

§§ 1785, 1786.

Corporations—Dissolution.

An action to dissolve a corporation brought by the attorney general under Code Civil Procedure, section 1786, upon the grounds stated in section 1785, is justified upon the application of a creditor who is interested in another corporation of the same name, at least in absence of anything to indicate that it was not brought by the attorney general in the discharge of a public duty and in entire good faith.

Corporations—Dissolution—Grounds.

An answer in dissolution proceedings admitting that the corporation has suspended its ordinary business for more than a year, since the filing of a petition in bankruptcy against it, discloses grounds for its dissolution under Code Civil Procedure, section 1785, subd. 3.

Corporations—Discharge in bankruptcy—Unpaid notes.

The discharge in bankruptcy of the notes of a corporation, so far as the same have not been paid by dividends from the bankrupt estate, is no defense to its dissolution under Code Civil Procedure, section 1785, subd. 2, which provides that a failure for a year to discharge its notes is a ground for the dissolution of a corporation, since such discharge in bankruptcy is not a payment of the notes.

Corporations—Dissolution—Discretion of Court.

A decree for the dissolution of a corporation, as authorized by Code Civil Procedure, section 1785, should be granted, when the plaintiff has shown the statutory requisites for a dissolution, although the court has power to exercise some discretion in such actions.

(*Decided March, 1907.*)

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Appeal by plaintiff from a judgment of the Supreme Court, Rensselaer County, dismissing a complaint for the dissolution of a corporation. Reversed.

The action was begun by the Attorney General, in behalf of the people, to secure the dissolution of the defendant corporation under subdivisions 1, 2, and 3 of section 1785 of the Code of Civil Procedure. The grounds stated in the complaint upon which the dissolution was sought were that the defendant has remained insolvent for at least one year, that it has neglected and refused for at least one year to pay and discharge its notes, and that it has suspended its ordinary and lawful business for at least one year. In the answer, the allegations of defendant's insolvency and of its failure to pay its notes were denied. It was also alleged, as an excuse for its suspension of business, that proceedings for the voluntary dissolution of the defendant in the Supreme Court of the state were instituted, and also that proceedings in involuntary bankruptcy against it in the United States District Court had been taken and its assets seized. It was also alleged that its estate had been administered in these proceedings, and that a discharge in bankruptcy of the debts of the defendant had been had, and that the action was not instituted for public purposes.

The defendant was a domestic corporation organized in 1898, having its principal place of business at Troy. Among its assets were two formulas for medicinal preparations; one called "Pixine," and one called "Save the Horse." The trustee in bankruptcy of the defendant sold the "Pixine" formula, and the exclusive right to the use of the trade-mark therefor, to one M. Arthur Wheeler, who was a stockholder and vice-president, of the defendant. All the other assets of the defendant, including the formula "Save the Horse," were sold by the trustee in bankruptcy to one Edgar G. McKaller. The latter, with his associates, formed a new corporation, with its principal office at Binghamton, under the

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same name as that of the defendant, viz., the Troy Chemical Company.

The action was tried by the court, which found, among others, the facts hereinafter stated. On March 14, 1904, a majority of the directors of the defendant instituted a proceeding for the voluntary dissolution of the defendant, because of its insolvency, pursuant to the provision of the Code of Civil Procedure. By the schedule attached to the petition in said proceeding, the total demands of the creditors of the defendant were stated to be \$11,930.14, and the total value of all its property to be \$7,892.83. A temporary receiver of the defendant was appointed in said proceeding, who qualified on March 10, 1904, and took possession of all the property of the defendant and continued the business until May, 1904. On that day three of the creditors of the defendant filed in the office of the clerk of the District Court of the United States for the Northern District of New York a petition in involuntary bankruptcy against the defendant. Such proceedings were had therein that on June 18, 1904, an adjudication was made adjudging the defendant to be bankrupt, and a trustee in bankruptcy of the estate of the defendant was appointed, who qualified by filing his bond on the 28th day of July, 1904, and all the property and assets of the defendant were turned over to him, and he continued the business for about four weeks from that time, and in doing so bought and sold property. On September 2, 1904, such trustee sold all the assets of the defendant except the cash and deposits in bank. Such assets when reduced to money, amounted to \$19,945.45. The debts and liabilities of the defendants, as ascertained in said bankruptcy proceedings, were \$16,729.21. The expenses of said bankruptcy proceedings were such that after the payment thereof by the trustee the remaining assets were insufficient to meet the liabilities; the deficiency being \$1,600. An order was duly granted by the United States District Court on April 3, 1906, discharging the defendant from its debts. In the month of

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December, 1903, the defendant executed two promissory notes, aggregating \$2,500 in amount, which became due and payable in the month of January, 1904. Said notes were transferred before maturity to the Union National Bank of Troy, which bank remained the owner and holder thereof at maturity, and until June 15, 1905, neither of which have been paid by the defendant. The court rendered judgment dismissing the complaint on the merits, and from that judgment this appeal is taken.

Messrs. Julius M. Mayer and Hinman, Howard & Kattell,
for the People.

Mr. William M. Morrill, for respondent.

CHESTER, J.—It is claimed by the defendant that McKaller caused this suit to be instituted to take the life of the defendant for the purpose of leaving his company, of the same name, the only one in existence, and that the action is not for a public, but for a private, purpose. A sufficient answer to this contention is that the action was instituted by the Attorney General, in the name of the people, under a provision of the Code of Civil Procedure authorizing him so to do. Code Civ Pro., section 1786. It appears that the action was so begun by the Attorney General upon the verified application of McKaller, who was a creditor of the defendant, after a hearing thereon before a Deputy Attorney General, upon notice to the defendant, upon which hearing defendant appeared by its attorney, who conceded that the facts stated in the complaint were true. The Attorney General therefore was wholly justified in commencing the action, and nothing appears to indicate that it was not brought in the discharge of a public duty and in entire good faith on his part.

It was admitted in the answer that, since the time of filing the said petition in bankruptcy (May 10, 1904), the busi-

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ness of the defendant had not been conducted. The action was commenced February 13, 1906, and the answer was dated April 20, 1906. This admission alone shows that the defendant had suspended its ordinary and lawful business for more than a year, which is one of the reasons assigned in the statute for which a judgment dissolving a corporation may be had.

Another ground for judgment of dissolution is where a corporation has neglected or refused for at least one year to pay and discharge its notes or other evidences of debt. It is true that the notes held by the Union National Bank of Troy, so far as they have not been paid by dividends from the bankrupt estate, have been discharged in bankruptcy; but such a discharge is not a payment of the notes. *Dusenbury v. Hoyt*, 53 N. Y. 521. The Legislature has seen fit to provide that a corporation must "pay and discharge" its obligations to save itself from being subjected to an action of this character. That it has not done, and it has allowed these notes to remain outstanding and unpaid for more than one year. The fact that it has received a discharge in bankruptcy cannot avail to save its corporate life, for the statute has decreed otherwise. Code Civ. Pro., section 1785, subd. 2.

We need not go into the question as to whether or not the learned trial court was correct in its conclusion that the defendant was not insolvent under the facts found, for the other two reasons are sufficient to require a reversal. The defendant, however, claims that the statute is simply permissive, and that the court may or may not, as it deems wise in the exercise of its discretion, award judgment dissolving a corporation, even though facts justifying its dissolution may be found. Even if it should be assumed that the court had some discretion in actions of this kind, it would evidently not be a proper exercise of it, when a cause of action is clearly established, for the court to prevent the law from taking its course and from being made effective. The plaintiff,

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having shown facts which under the law are clearly sufficient to sustain an action dissolving a corporation, should have been awarded a judgment for that purpose.

The judgment should be reversed on the law and on the facts, and a new trial granted, with costs to the appellant to abide the event. All concur; SMITH, P. J., and KELLOGG, J., in result.

WILLIAM B. HERSEREAU, PLAINTIFF, v. L. K. HIRSCH CO., DEFENDANT.

SUPREME COURT, SPECIAL TERM, MARCH, 1907.

(Not Officially Reported.)

Attachment—Affidavit—Sufficiency.

An attachment granted in an action brought to recover the price of a locomotive sold to the defendant by plaintiff, based on an affidavit alleging that the defendant is a foreign corporation, will not be vacated because such allegation is stated as a positive fact, although the plaintiff could not know such fact upon his personal knowledge.

(Decided March, 1907.)

Motion to vacate a writ of attachment. Denied.

Mr. Dana L. Jewell, for the motion.

Mr. Creighton S. Andrews, opposed.

BROWN, J.—It is stated in defendant's brief that lien by reason of attachment has been released and bond given by defendant, and defendant asks that bond be canceled upon vacation of attachment. It thus appears that plaintiff will

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be remediless if attachment is set aside. Motion is made on original papers, defendant claiming that judge granting attachment did not have jurisdiction for reason that plaintiff's papers upon which attachment was granted did not show that defendant was a foreign corporation; that while plaintiff's affidavit positively states that defendant is a foreign corporation, such statement is a conclusion which must be based upon hearsay, and plaintiff would not be permitted to testify to such fact upon a trial; that plaintiff could not know such fact upon his personal knowledge.

While the rule is that when positive allegations are required in an affidavit it is not satisfied by allegations positive in form to facts which cannot be supposed to be within the knowledge of the deponent, I am of the opinion that upon the facts of this case the positive allegation or statement in plaintiff's affidavit that defendant is a foreign corporation duly organized under the laws of the state of Illinois, it cannot be supposed that the plaintiff did not have personal knowledge thereof and was incompetent to make such statement. The affidavit of plaintiff reveals the fact that the transaction resulting in the indebtedness sued for was a personal one between the plaintiff and the defendant. This transaction was the purchase by the defendant of a locomotive from the plaintiff. The presumption must be that whatever the plaintiff learned of and concerning the defendant and whatever information the plaintiff had of and concerning defendant's corporate capacity and its place of incorporation was gained from the defendant itself. The fact that plaintiff states that defendant was incorporated under laws of Illinois is very significant as indicating plaintiff's source of knowledge.

This motion being based solely upon the papers on which the attachment was granted, all necessary inferences and deductions must be construed in favor of the plaintiff, and defendant concedes all that is stated therein. It does not appear that it was impossible for plaintiff to have known that

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the defendant is a foreign corporation duly organized under the laws of Illinois for the purpose of making the affidavit by learning the same from the person who, representing the defendant, purchased the locomotive of the plaintiff for the defendant. He could have known it from examination of records of incorporation in Illinois. He could have known of it by communications from defendant at any of the times mentioned in the affidavit when transactions were had between them. The fact whether or not the defendant is a foreign corporation is a matter peculiarly within the knowledge of the defendant. The plaintiff states that defendant is a foreign corporation duly organized under laws of Illinois. The defendant will not be heard to say that plaintiff could not have personal knowledge that defendant was such a corporation without denying it is such a corporation. This affidavit of the plaintiff is presumed to have been made on personal knowledge. It is not stated to have been made on information and belief. It does not appear affirmatively nor by a fair inference that the statement relative to defendant's corporate capacity could not have been and was not within the personal knowledge of plaintiff.

Motion denied, with \$10 costs to plaintiff.

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MERRILL & BAKER, RESPONDENTS, v. HELENA
WOOLWORTH, APPELLANT.

SUPREME COURT, APPELLATE TERM, MARCH, 1907.

§ 870 ET SEQ.

Discovery—Examination before trial—When proper.

After issue is joined, an examination of the defendant before trial as permitted by Code Civil Procedure, section 870 et seq., should be limited to the purpose of proving the plaintiff's case as set forth in his complaint, and should never be allowed where the apparent and only object is to obtain information concerning facts upon which the defense is based.

(Decided March, 1907.)

Appeal from an order for the examination of defendant before trial. Reversed.

Mr. George Zabriskie, for appellant.

Messrs. Peck & McCann, for respondent.

HENDRICK, J.—The complaint in the action sets forth a specific agreement between the Grolier Society of New York, plaintiff's assignor, and Helena Woolworth, the defendant, for the purchase of a certain set of writings of Alexander Dumas. This agreement is specific in its terms, and upon it the plaintiff must stand or fall. The answer of the defendant admits that a contract was entered into between the parties mentioned, but denies that it was in the form set forth in the complaint. The affidavit upon which the plaintiffs based their application for an examination of the defendant before trial states:

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"I may be surprised upon the trial by the production and proof of some other agreement, the performance of which I may, according to its terms, not be prepared to prove."

The affidavit further states that the deponent is informed by his counsel that the examination of the defendant at this time is necessary in order to properly prepare the case for trial and to prevent surprise thereon. It would appear, from an examination of all the papers on appeal, that this is an effort to discover evidence to be adduced by the defendant on the trial, in order to establish her defense to the allegations of the complaint. After issue is joined, an examination of the defendant before trial should be limited to the purpose of proving the plaintiff's case as set forth in his complaint. Such examinations are never allowed where the apparent and only object is to obtain information concerning facts upon which the defense is based. Neither are such examinations allowed merely for the purpose of enabling a party to prepare for trial. *Dudley v. N. Y. Filter Mfg. Co.*, 80 App. Div. 164, 80 N. Y. Supp. 529. The cases are many and uniform in holding this doctrine.

The orders of December 5, 1906, and of December 13, 1906, denying the motion to vacate the order directing examination, should be reversed, and the order dated November 24, 1906, directing the examination of the defendant before trial, should be vacated, with costs and disbursements, and with \$10 costs on appeal to this court. All concur,

Matter of Burr.

MATTER OF BURR.

SUPREME COURT, APPELLATE DIVISION, THIRD DEPARTMENT, MARCH, 1907.

§ 2685.

Executors and Administrators—Removal.

The power to remove an executor as permitted by Code Civil Procedure, section 2685, is given for the protection of estates, and the power should not be exercised when the purpose of the petitioner is clearly not to protect the estate, but to punish the executor.

Trusts—Trustee—Removal—Grounds.

A trustee should not be removed for every breach of duty or even breach of trust, if the fund is in no danger of being lost; there must be such misconduct as to show want of capacity or of fidelity, putting the trust in jeopardy.

Executors and Administrators—Unauthorized investments.

The fact that an executor has invested portions of the estate in western mortgages and loaned money upon a promissory note, contrary to law, is not a ground for revoking his letters, where such investments were made in good faith and the loans have been paid in full, and his accounts have been judicially settled at an immediate accounting.

(Decided March, 1907.)

Appeal from a decree of the Surrogate's Court of Broome County revoking letters testamentary. Reversed.

Mr. Taylor L. Arms, for appellant Isabella D. Burr.

Mr. S. C. Millard, for appellant George M. Burr.

Mr. Isaac Weill, for respondent.

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CHESTER, J.—The decree appealed from revokes the letters testamentary issued to George M. Burr, the executor named in the will of Henry A. Sheldon, deceased. It was made upon the petition of Mary E. Wiggins, who was one of the residuary legatees and next of kin of said deceased. The proceedings were instituted under section 2685 of the Code of Civil Procedure, providing for the revocation of letters, and under subdivision 2 thereof, which provides that they may be revoked "where, by reason of his having wasted or improperly applied the money or other assets in his hands or invested money in securities unauthorized by law or otherwise improvidently managed or injured the property committed to his charge; or by reason of other misconduct in the execution of his office, or dishonesty, drunkenness, improvidence, or want of understanding; he is unfit for the due execution of his office." The following section requires that "a petition presented as prescribed in the last section must set forth the facts and circumstances showing that the case is one of those therein specified." A petition was presented in this case, and an answer was interposed raising issues to be tried, and denying all the charges of misconduct on the part of the executor. The surrogate in his decision assigned several reasons for removing the executor relating to his management of the estate, only one of which was a cause assigned in the verified petition or within the issues framed by the petition and answer. One of these causes, which was entirely without the issues presented for trial, was in a finding by the surrogate that the executor was indebted to the estate in a large amount, evidenced by his note for \$10,984.96, dated November 9, 1899, and payable on demand, which he did not include in the inventory of the estate or in his account. This finding was based upon an entry contained in an account book covering 164 pages of the printed record, which had been received in evidence.

It was urged on the argument of the appeal in behalf of the executor that no such claim was made in the petition for

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his removal or litigated upon the trial, and that the first knowledge which the executor or his counsel had that any such question was involved was when the findings were made on the settlement of the case. The claim was also made on the argument that the note referred to had, in fact, been paid by the executor, and the amount thereof included in the inventory of the estate and in his accounting. Notwithstanding this matter was entirely outside of the issues, in view of the serious nature of the charge involved in the finding, we deemed it but fair that the executor should have an opportunity to make the proofs which it was claimed he possessed in relation thereto to show its falsity. We therefore, as preliminary to deciding the appeal, referred the matter under section 2586 of the Code of Civil Procedure to a referee to take testimony and report to this court with his opinion whether the note referred to was paid by the executor, and the amount thereof included in the inventory of the estate. The report of the referee has now come in, and he finds upon evidence that is absolutely conclusive that the note referred to was paid by the executor and the principal sum included in the inventory and also in his account, and that the account also contained the accrued interest due on the note at the date of the death of the decedent. This report clearly emphasizes the impropriety of permitting the parties to go outside of the issues in a matter of this kind, and shows clearly that this executor in this respect at least has been subjected to a grave injustice, and leads us to say further that we need not discuss the other matters outside of the issues assigned as causes of removal, none of which under the circumstances and proof in this case were deemed by us of sufficient moment to be the foundation of further inquiry under the order of reference which we made.

The only charge of substance within the issues which was assigned by the surrogate as a reason for the removal was that the executor had invested moneys of the estate in securities unauthorized by law; but that charge is rendered of

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no serious importance by reason of the findings of the surrogate that no loss has accrued to the estate on account of any investment made by the executor, and that he has never been compelled to foreclose any of the securities that he has taken for the estate. There was a further finding that the proceeding for the removal of the executor was not commenced until after the judicial settlement of his accounts and a distribution and division of the property made as provided by the decree upon such settlement. That decree recites that the executor has fully accounted for all the personal estate and personal property of the estate of said deceased which has come into his hands as such executor, and his accounts were thereupon judicially settled and allowed as filed and adjusted. This settlement, although termed an intermediate accounting, was made after due service of a citation therefor upon the petitioner. She was therefore bound thereby, and it has removed from the legitimate field of controversy many matters which appear to have been litigated in this proceeding. The reason of the surrogate for the removal seems to be that it was his duty to take into consideration all of the acts of the executor whether before or after the decree of settlement which in any way affected his conduct in the management of the estate. The authorities upon which he apparently relied, however, were cases which were not brought for the removal of the executors or trustees, but to charge them for losses by reason of unauthorized investments.

The power to remove an executor is given for the protection of estates, but that power should not be exercised when the purpose of the petitioner is clearly not to protect the estate, but to punish the executor. *Elias v. Schweyer*, 13 App. Div. 340, 43 N. Y. Supp. 55; *Matter of Monroe*, 142 N. Y. 491. That is the rule laid down by the elementary writers. In *Perry on Trusts*, section 276, it is said:

“There must be a clear necessity for interference to save the trust property before an executor or trustee shall be

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removed. The power of the removal of trustees appointed by deed or will ought to be exercised sparingly by the court. Nor will a trustee be removed for every violation of duty, or even breach of trust, if the fund is not in danger of being lost. There must be such misconduct as to show want of capacity or of fidelity, putting the trust in jeopardy."

This rule is cited with approval in *Matter of O'Hara*, 62 Hun, 534, 17 N. Y. Supp. 91, and in *Elias v. Schweyer*, *supra*.

In Story's *Equity Juris.*, section 1289, it is said:

"It is not, indeed, every mistake or neglect of duty, or inaccuracy of conduct of trustees, which will induce courts of equity to adopt such a course (i. e., to remove trustees). But the acts or omissions must be such as to endanger the trust property, or to show a want of honesty, or a want of a proper capacity to execute the duties, or a want of reasonable fidelity."

So, also, in *Matter of Monroe*, 142 N. Y. 491, which was a proceeding to remove an administrator, the court says:

"This is a proceeding, not to punish the administrator, but to protect the estate, and it was invoked in this case under circumstances wholly unnecessary and unjustifiable. The court found that the administrator and his sureties were financially responsible and able to make good the estate if it suffered loss. The unimportant and vexatious questions litigated in this proceeding could have been disposed of on the accounting and the administrator charged in a final decree for all losses he had caused the estate, if any such were proved."

In the brief of respondent's counsel he says:

"The petitioner did not attempt in this proceeding to remove the executor for any loss occasioned by his acts while acting as such, but was brought for the purpose of reviewing his conduct as executor and to determine whether or not he should continue in that office."

Here is a concession which shows that the proceeding is

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entirely outside of the purposes for which it may legitimately be commenced and prosecuted, under the law, to remove an executor. The conduct of the executor, so far as his accounts were concerned, received judicial approval when his accounts were settled.

It there appeared that he had administered a personal estate received from the testator amounting to \$183,068.83 and which was increased under his management by the sum of \$16,964.63. It also appears that the testator had for many years, through the agency of this same George M. Burr, who was his son-in-law, and whom he made his executor, invested considerable portions of his estate in first mortgages on lands in western states, many of which were on hand at the date of his death, and that Burr as executor made a number of investments of moneys belonging to the estate in the same way. There was also proof that he and his coexecutors, the testator's widow, also loaned \$34,696.33 of moneys belonging to the estate to one Louis Sands upon his promissory note. It is true that these investments were unauthorized under the law relating to the administration of trust estates, but there is nothing in the evidence to show that they were not made in entire good faith, and for what was believed to be for the best interest of the estate. Sands was a man, according to the evidence, to whom the testator had been in the habit of loaning money. He was the president of a national bank, the largest taxpayer in his city, and a man, according to Mr. Burr's testimony, worth between \$1,000,000 and \$2,000,000. The loan to him was repaid in full, with all interest thereon, and the surrogate so found. He also found and the decree on the accounting, which included all the investments which were questioned, shows that the estate never lost a dollar by any investments made by his executor.

After receiving and receipting for her distributive share pursuant to the decree on the intermediate accounting, the petitioner commenced this proceeding to remove him from

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his trust. It appears that there remains of the estate in his hands only \$3,770 which was in notes taken by the testator that had not been paid at that time, and which amount is barely sufficient to pay the executor's commissions and the expenses of a final accounting. He is a man of abundant means, according to the proofs, to render the estate entirely secure in his hands, and he has not been shown in any sense to be a person "unfit for the due execution of his office." We think no just or legal cause for his removal was shown, and for the reasons stated that the decree appealed from should be reversed.

Counsel for the executor asks that there shall be refunded to him the costs and disbursements which he was ordered in the decree to pay to the petitioner, and which it is claimed were paid in order to perfect the appeal, but we find nothing in this record showing this payment and nothing upon which we can now properly compel restitution. That matter must therefore be left to a separate motion.

Decree reversed on the law and on the facts, with costs against the petitioner personally, and said George M. Burr reinstated as executor. All concur.

SAVERIO FERRACA, PLAINTIFF, *v.* AARON MILLER
REALTY CO., DEFENDANT.

NEW YORK CITY COURT, SPECIAL TERM, APRIL, 1907.

§ 791, RULE 2.

Trial—Preference—Loss of.

The plaintiff in an action upon a promissory note brought against a corporation, does not exhaust his right to a preference over other issues by making a motion for a preference under Code Civil Procedure, section 791, which permits a preference in such actions,

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so as to preclude him from moving to advance the cause on the special calendar as provided by Rule 2 of the New York City Court.

(Decided April, 1907.)

Motion to advance cause and place it upon special calendar as provided by Rule 2. Granted.

Messrs. Cohen Bros., for plaintiff.

Mr. J. Charles Weschler, for defendant.

WADHAMS, J.—Motion is made to advance this cause and to place it on a special calendar as provided by rule 2 of the rules of this court. The plaintiff submits the proof required by the rule. The action is upon a promissory note, and is brought against a corporation. The defendant opposes the application on the ground that the plaintiff heretofore made an application for a preference under section 791 of the Code of Civil Procedure. That motion was granted, and the cause preferred over the March issues.

It is contended that the plaintiff exhausted his right to preference over other issues by making the motion for preference under section 791 of the Code, and cites *Marsh v. Standard Structural Co.*, 35 Misc. Rep. 381, 71 N. Y. Supp. 1025, decided by the General Term of this court. It was there determined merely that the appropriate facts must be shown on each motion to bring the application within the provisions of the Code or the rule, as the case might be. Mr. Justice Hascall there says:

“He was doubtless entitled to a preference on either of two grounds, but could not urge a right to a statutory preference, for the reason that he could try his cause within an hour or vice versa.”

The reason for this is obvious. The motion for statutory preference must be made at the time the cause is noticed for trial, and in this court must be made at Trial Term, part 1.

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Rule 3. The motion for advancement under the court rule on the ground that the cause may be tried in two hours may be made at any time, and must be made at Special Term.

Rule 2. The court rule was adopted to provide additional relief in certain cases not specified in the statute, but does not operate to prevent the advancement of causes specified in section 791 of the Code, provided such causes are also within the rule. Neither is section 791 exclusive in its effect. The rule and the Code are supplementary, and both may be invoked in the same cause. So here the plaintiff was entitled to preference on two grounds. On the statutory ground he was only entitled to preference over the March issues, and under the rule he is entitled to advancement of the special calendar for causes that may be tried in two hours.

Motion granted. The cause will be set down for trial on April 19th.

**EBLING BREWING COMPANY, RESPONDENT, v.
PHILIP ADLER, APPELLANT.**

SUPREME COURT, APPELLATE TERM, MARCH, 1907.

§§ 545, 546.

Pleading—Striking out allegations—Redundant.

A paragraph of an answer constituting a good denial should not be stricken out, under Code Civil Procedure, section 545, because it is redundant or irrelevant.

Pleading—Separate stating and numbering—Motion.

A demand for a separate stating and numbering of defenses under Code Civil Procedure, section 546, should be made on a motion

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to make the pleading more definite and certain, and not on a motion to strike out matter as redundant or irrelevant. (*Decided March, 1907.*)

Appeal by defendant from an order of the City Court of New York City striking out certain portions of his answer as redundant. Modified.

Mr. M. Hallheimer, for appellant.

Messrs. Nathan, Leventritt & Perham (William L. Cahn, of counsel), for respondent.

DAVIS, J.—This is an appeal from an order striking out certain paragraphs of defendant's answer and requiring him to separately state and number an alleged defense of payment and of the statute of limitations. The notice of motion purports to be for an order requiring defendant to make his answer more definite and certain. But the changes sought in the notice of motion and compelled by the order herein should be the subject of a motion to strike out as irrelevant, redundant, or scandalous. Section 545, Code. The demand to separately number the defenses is excepted, of course; that being properly the subject of a motion to make more definite and certain. Section 546, Code.

In its notice of motion the plaintiff asks that five different parts of the answer be stricken out. The court below evidently treated the motion as one to strike out redundant and irrelevant matter, and so it will be treated on this appeal. We think it was error to strike out paragraph 1 of the answer. It is a good denial. *Griffin, Rec'r, v. L. I. R. R.*, 101 N. Y. 348, 354. The case of *Barton v. Griffin*, 36 App. Div. 572, 55 N. Y. Supp. 477, is not in point. In that case the denial was qualified by the words "qualified or explained."

We also think it was error to strike out the part designated under (b) in the order. This part contains specific denials of the allegations of paragraph 5 of the complaint. It

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was error to strike out all of paragraph 3. The first part of this paragraph attacks the assignment pleaded in paragraph 7 of the complaint as a forgery. But the remainder of paragraph 3 of the answer was properly eliminated, and the same is true of paragraph 5 of the answer.

The demand for a separate stating and numbering of defenses assumed to be set forth in paragraph 4 should have been made in a motion to make definite and certain. So far as the order granted this part of the motion, it is error, not alone, however, because it was granted in this form of motion, but also because two causes of action are not stated in that paragraph. The defense of the statute of limitations is the only defense alleged there.

The order below, however, should be affirmed, so far as it strikes out as irrelevant and redundant that part of paragraph 4, beginning with the words "without giving," and thence as far as the words "hence this defendant." Inasmuch as the defendant was forced to appeal, the order below having practically destroyed his answer, he should have the costs of this appeal, and be relieved of the payment of the \$10 motion costs below.

The order appealed from is modified, as above indicated, and, as modified, affirmed. All concur.

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THOMAS J. O'NEILL, ET AL., RESPONDENTS, v.
CHRISTOPHER CAMPBELL, ET AL., APPELLANTS.

SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT,
MARCH, 1907.

§§ 66, 74, 75.

Attorney and client—Champerty—Retainer.

A retainer signed by one who had suffered personal injuries, at the instance of an unknown person who asked him if he needed money and who promised to see him again, it not appearing whether such conversation took place before such retainer was signed, is not invalid under Code Civil Procedure, section 66, which provides that the compensation of an attorney for his services is governed by agreement, expressed or implied, which is not restrained by law, and section 74, which provides that an attorney shall not by himself, by or in the name of another, either before or after action brought, promise or give, or procure to be promised or given a valuable consideration to any person, as an inducement to placing in his hands, or in the hands of another, a demand of any kind for the purpose of bringing an action thereon, and section 75 which makes a violation of section 74 a misdemeanor.

(Decided March, 1907.)

Appeal by defendants from a judgment of the Supreme Court in favor of plaintiffs. Affirmed.

Mr. William J. Moran, for appellant.

Mr. Thomas J. O'Neil, for respondent.

LAUGHLIN, J.—The material facts are fully stated in the opinion of Mr. Justice INGRAHAM. It does not appear that the conversation between the client and the person who represented the plaintiffs in procuring the retainer, upon which it is sought to invalidate it, took place before the retainer was signed, or that the client was induced thereby to execute the retainer. I am of opinion, therefore, that the appellant

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failed to show facts sufficient to require an adjudication that the retainer was invalid.

It follows that the judgment should be affirmed, with costs.

PATTERSON, P. J., and HOUGHTON, J., concur.

INGRAHAM, J. (dissenting).—The complaint alleges that on or about June 21, 1905, the defendant James Quinn, "by retainer in writing, retained and employed the plaintiffs to act as his attorneys, and to institute on his behalf an action against the defendant, Christopher Campbell, to recover damages for personal injuries sustained by the said James Quinn on June 21, 1905, while in the employ of the said Campbell, and did then and there agree with the plaintiffs that they, the plaintiffs, should receive 50 per cent. of any settlement, verdict, or recovery had in said action, and that plaintiffs should receive in addition thereto all the costs of the action recovered or to which the said James Quinn might be entitled"; that in pursuance of this retainer the plaintiffs, as attorneys for the said Quinn, commenced an action in the Supreme Court to recover damages for the personal injuries so sustained by Quinn; that on or about the 29th day of August, 1905, "the said defendants, wrongfully contriving and conspiring to deprive these plaintiffs of their compensation for their services in said action under the agreement as aforesaid, did collusively and without the knowledge of the plaintiffs settle the said cause of action so sued upon" for the sum of \$300. The relief demanded is that the plaintiffs be adjudged to have a lien upon said settlement, and that they have judgment against the defendants for the sum of one-half thereof and for such other relief as the court may deem proper. The defendant Campbell interposed an answer, which in substance was a general denial. The court found the facts as alleged in the complaint, and awarded judgment for \$150 against the defendants.

One of the plaintiffs was examined as a witness, and

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testified to the commencement of the action of Quinn against Campbell, of the service of a summons on the defendants and the appearance of the defendant on September 18, 1905, the subsequent service of an unverified complaint, and the service of a verified answer by the defendant. Plaintiff then called the defendant Quinn, who testified that he signed the retainer, which was introduced in evidence. The accident which caused the defendant Quinn's injuries was alleged in the complaint to have occurred on the 21st of June, 1905, and the alleged retainer was dated June 22, 1905. That instrument reads as follows:

"I, James Quinn, aged 42, occupation, bricklayer, the undersigned, of 310 E. 44th St., do hereby employ O'Neill & Shay counsellors at law to institute legal proceedings in my behalf against the proper defendant or respondent, to recover damages sustained by me on or about the 21st day of June, 1905, and I do hereby agree with my said attorney to pay him fifty per cent. of any settlement, verdict or recovery had in said action, and he in addition thereto to receive all costs recovered or to which they may be entitled. And I agree with my said attorneys not to make any settlement unless they are present and receive their share in accordance with this agreement, and I do hereby grant to my said attorneys full power to act for me in bringing about a compromise or settlement of my case the same as if I were present.

"James Quinn."

"Dated, New York, June 22, 1905.

"Witness: Ridd. R. Roch,

"David J. Wildrents."

Quinn further testified that he received \$300 in settlement of his action against Campbell, and that he never paid anybody any part of it. On cross-examination the witness testified: That he never saw either of the plaintiffs before the day of trial. That the circumstances under which he

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signed the paper was that an unknown person came to him the day he was injured, and, when he signed the paper, asked him if he "needed anything for the house; would I need any money. I told him, 'No'; not at present, I had some money coming off a job. He [the unknown person] said all right, may be within a week or so I will come around to see you. I said, 'All right, may be I will need you some after this.' " That it was either seven or eight weeks after that before the witness saw anybody connected with the plaintiffs. That he never had any correspondence with them, and was never in their office. That he was never asked to sign any paper other than the alleged retainer. That neither of the plaintiffs ever called upon him. On redirect examination he stated that he did not know anything about the date of the paper; that he signed it the day he was injured, and knew he was employing a firm of lawyers. This is all the evidence in the case.

The only question presented is whether this instrument was a retainer which gave to the plaintiffs a lien upon Quinn's cause of action to recover for personal injuries. Section 66 of the Code of Civil Procedure provides that:

"The compensation of an attorney or counselor for his services is governed by agreement, express or implied, which is not restrained by law."

This plainly means an agreement which is recognized by the law as a valid agreement. An agreement obtained for a consideration which is valid, or upon inducement which is expressly prohibited, would not be an agreement which was "not restrained by law." The relations between an attorney and his client are regulated by the title of article 2, tit. 2, c. 1, of the Code of Civil Procedure, of which section 66 is a part, and the provisions of section 66 of the Code of Civil Procedure, which provide for an agreement not restrained by law, do not include an agreement which, by a subsequent provision, is made illegal or is prohibited. Such an agreement would be an agreement restrained by

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law. Section 74 of the Code of Civil Procedure provides that:

"An attorney or counselor shall not by himself, or by or in the name of another person, either before or after action brought, promise or give, or procure to be promised or given a valuable consideration to any person, as an inducement to placing, or in consideration of having placed, in his hands or in the hands of another person, a demand of any kind for the purpose of bringing an action thereon."

And section 75 of the Code of Civil Procedure provides that an attorney or counselor who violates this section is guilty of a misdemeanor. If this section, therefore, was violated, or the execution of this instrument was obtained by the promise of a valuable consideration to Quinn as an inducement to place, or in consideration of having placed, in the hands of these plaintiffs this demand for the purpose of bringing an action upon it, it was an agreement which the law prohibited, and was not a retainer within section 66 of the Code of Civil Procedure.

The rules of the common law in regard to the relations between attorney and client have been abolished in this state, and the parties are left to determine the compensation of a lawyer by agreement. Such agreement, however, must comply with the further provisions of the Code of Civil Procedure. The right of the plaintiffs to recover from the defendant Campbell depends upon the plaintiffs having a lien upon Quinn's cause of action against Campbell which plaintiffs could enforce as against Quinn, when the person obtaining the execution of this retainer asked Quinn if he "needed anything for the house"; and, upon Quinn replying that he did not need money at present as he had "some money coming off a job," the person obtaining the agreement said, "All right; may be within a week or so I will come around to see you"—to which Quinn replied, "All right; may be I will need some after this." There was, I think, a promise to Quinn to give him money if he needed it. Quinn does not

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testify that this promise was a consideration for his execution of this agreement, but it certainly was an implied promise to provide him with money, if he needed it, made at the time the instrument was executed, and was a violation of section 74 of the Code of Civil Procedure.

So far as the enforcement of civil rights are affected, the plaintiffs by accepting the benefits of the agreement and attempting to enforce it adopted the representations and promises that were made at the time it was executed, and they are thus seeking to enforce an agreement which was obtained under circumstances which made the person procuring it guilty of a misdemeanor. The fact that the promise to give money was indefinite, the amount and time of payment not being fixed, and the conditions under which the payment should be made not settled does not relieve the transaction from the condemnation of section 74 of the Code of Civil Procedure. It was an understanding that Quinn should receive a valuable consideration as an inducement to retain the plaintiffs to commence an action against his employer; a promise having for its object the inducing of Quinn to retain the plaintiffs as attorneys. I think an agreement thus procured is "restrained by law," and thus an agreement which gives no lien to the attorney upon his client's cause of action, and one that the court should not enforce. The object of making this promise is plain. It could have no other purpose than to induce Quinn to retain the plaintiffs, and if a promise obtained under such circumstances is enforced, a simple method is provided for evading the prohibition contained in section 74 of the Code.

It follows that the judgment appealed from should be reversed and a new trial ordered, with costs to the appellant to abide the event.

LAMBERT, J., concurs.

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EMMELINE CARTIER, APPELLANT, v. WILLIAM R. SPOONER, RESPONDENT.

SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT, MARCH, 1907.

§§ 14, 66, 724, 1282, 1290, 2266 et seq.

Attorney and client—Power of court over attorney.

The Supreme Court has power under Code Civil Procedure, sections 14 and 2266 et seq., over its attorneys at law to compel them to deal fairly with their clients.

Attorney and client—Proceeding to determine fee.

A proceeding under Code Civil Procedure, section 66, instituted by a client to determine the reasonable compensation of an attorney is a special proceeding and not an action, and no formal judgment can be entered thereon.

Attorney and client—Report of referee as to fees—Judgment.

Code Civil Procedure, section 1282, which appears in a chapter of the Code entitled "Judgment in an Action," and provides that judgments may be entered upon the report of a referee, has no application to a proceeding under section 66, which provides that the compensation of an attorney is governed by agreement, and that upon a petition by an attorney or client, the court may determine and enforce the lien, where it appears that after the attorney had collected money belonging to his client, the latter petitioned for a reference to determine whether or not a proper sum had been retained, and the order of reference provided that the referee should hear and determine the amount due, and a judgment in favor of the attorney entered upon the report of the referee without application to the court for confirmation is without authority.

Judgment—Motion to set aside—Limitations.

A motion to set aside a judgment in a proceeding by a client under Code Civil Procedure, section 66, to determine whether an at-

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torney has retained a proper sum, entered upon the report of the referee appointed in such proceeding, without application to the court for confirmation, is not affected by the limitations imposed by Code Civil Procedure, section 724, which provides that the court in its discretion at any time within one year after notice relieve a party from judgment taken against him through his mistake, or excusable neglect, or by section 1282, which provides that a motion to set aside a final judgment for irregularity shall not be heard after the expiration of one year, since the filing of the judgment roll, or by section 1290, which provides that a motion to set aside a final judgment for error in fact, not arising upon the trial, shall not be heard, with certain exceptions, after the expiration of two years, since the filing of the judgment roll; but in case these sections do apply, the court has inherent power over its judgments and may exercise that power in furtherance of justice.

(Decided March, 1907.)

Appeal by plaintiff from a judgment of the Supreme Court from an order denying a motion to set aside a judgment. Reversed.

Mr. Leon Lauterstein, for appellant.

Mr. William R. Spooner, in pro. per.

HOUGHTON, J.—In April, 1904, the respondent, as attorney for the petitioner, collected for her from a benevolent life insurance order a claim of \$3,000. In August following proceedings were begun by petition and order to show cause to compel the respondent to pay to the petitioner such money, and \$1,963.21 was paid to her, the respondent retaining the sum of \$1,036.79 as his fees and disbursements. The retention of this sum was not satisfactory to the petitioner, and the proceeding resulted on the 24th day of February, 1905, in an order of reference to determine whether or not a proper sum had been retained. This order of reference provided that the referee should hear and determine the amount due. Hearing was had before the referee, and on his report in favor of respondent, without application to the court for

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confirmation, judgment was entered on the 19th day of December, 1905, in the clerk's office of New York county, against petitioner for \$913.10, referee's and stenographer's fees, and execution directed thereon. On the 1st day of March, 1906, petitioner moved to set aside such report, and for leave to file exceptions thereto. The motion to set aside was denied, and leave to file exceptions *nunc pro tunc* was granted. On the 2d day of January, 1907, the petitioner moved to set aside the judgment entered December 19, 1905, and from the denial of such motion this appeal is taken.

There is no authority for the entry of a judgment in a special proceeding of this character. The petitioner was the client of the respondent, an attorney of this court. He had moneys in his hands which, as attorney, he had collected for her, and upon which he had a lien for compensation for his services, measured, in the absence of any specific legal agreement therefor, by their fair value. Under the provisions of section 66 of the Code of Civil Procedure, the client, this petitioner, had the right to present her petition to this court to have the amount of such compensation and lien determined. Such a proceeding, instituted by petition, is not an action, but is a special proceeding, and no formal judgment can be entered thereon. *Ward v. Ward*, 67 App. Div. 121, 73 N. Y. Supp. 450. The Supreme Court has inherent power over its attorneys at law to compel them to deal fairly with their clients, and if an attorney has in his hands moneys belonging to the client, collected by him as such attorney, upon which he has no lien for compensation, the court will deal summarily with him, and enforce its payment as for a contempt. *Matter of Bornemann*, 6 App. Div. 524, 39 N. Y. Supp. 686; *Matter of Langslow*, 167 N. Y. 31; Code Civ. Pro., sections 14, 2266, et seq.

Section 1228 of the Code of Civil Procedure, providing that judgments may be entered upon the report of a referee, has no application to a special proceeding instituted as this was, notwithstanding the provisions of the order that the

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referee should hear and determine the matter. That section appears in chapter 11, and under title 1 of such chapter, which is entitled "Judgment in an Action." In the present case there was no action, and notwithstanding the provisions of the order, it is necessary that the referee's report be presented to the court for confirmation, and upon such motion the court was called upon to exercise its judgment and confirm or reject it, and decide the matter for itself. In a proceeding of this character the court must determine the controversy, and it may order a reference only for the purpose of assistance to itself in that regard. It cannot shift the whole matter to a referee. If a reference be ordered, the matter must come back to the court on the report of the referee for final determination, and the report may be adopted or disregarded, and a different decision made on the facts. *Matter of Ney Co.*, 114 App. Div. 467, 99 N. Y. Supp. 982; *Marshal v. Meech*, 51 N. Y. 140. Such being the proper practice of the court, the order, although in form to hear and determine, must be deemed to be the order which the court had the right to make, and must be considered as an order to hear and report. See *McCleary v. McCleary*, 30 Hun, 154; *Bentes v. Brady*, 8 How. Prac. 216. The respondent having obtained from the referee a report in his favor should have presented it to the court for confirmation instead of entering judgment thereon as was done.

It is insisted, however, that the appellant is too late in making her motion to set aside the judgment, in that she did not move within one year from its entry as prescribed by section 1282 of the Code. That section relates to the setting aside of judgments for irregularity, and provides that such motions shall not be made after the expiration of one year from the filing of the judgment roll. The entry of judgment herein was not an irregularity. It was a nullity because there was no authority for its entry. We do not think the petitioner's motion came within the provisions of the above section, or within the provisions of sections 1290 or

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724 of the Code. But if it did, the court has inherent power over its judgments, and is not limited by the provisions of those sections (*Furman v. Furman*, 153 N. Y. 309; *Ladd v. Stevenson*, 112 N. Y. 325), and the present instance is a case in which that power should be exercised in the furtherance of justice. All the facts are not before us, but so far as they appear both the expenses of the reference and the compensation of the attorney are unreasonably large. On a presentation of the report of the referee to the Special Term for confirmation, however, the whole matter can be determined.

The order must be reversed, with \$10 costs and disbursements, and the motion to set aside the judgment granted, with \$10 costs. All concur.

WILLIAM M. ROSENTHAL, APPELLANT, v. BELL
REALTY CO., RESPONDENT.

SUPREME COURT, APPELLATE TERM, MARCH, 1907.

§ 997.

Trial—New trial—Newly discovered evidence.

A new trial is properly granted on the ground of newly discovered evidence in an action for work, labor and services, in which the defendant claimed that the work was ordered through a third person who had been paid in full, and that there were no contractual relations between defendant and plaintiff, where the defendant excused the absence of such third person, and presented such person's affidavit showing that he was a material witness, and stating that he did the work in connection with the plaintiff, was financially interested in the transaction, that the plaintiff was to receive only a commission, and that he had been paid.

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Trial—New trial—Absence of settled case.

The court has power to entertain and decide a motion for a new trial on the ground of newly discovered evidence upon the pleadings and affidavits, in the absence of a settled case, where no objection is made on the argument of the motion that a settled case is necessary, under the provisions of Code Civil Procedure, section 997.

Trial—New trial—Discretion of court—Abuse.

An order granting a motion for a new trial on the ground of newly discovered evidence, where the facts are in dispute, lies within the discretion of the Court, and the exercise of that discretion will not be disturbed on appeal, unless there has been an apparent abuse of it.

(Decided March, 1907.)

Appeal by plaintiff from an order of the Municipal Court of New York City granting a motion for a new trial on the ground of newly discovered evidence. Affirmed.

Messrs. Marks & Marks, for appellant.

Mr. Bennett E. Siegelstein, for respondent.

HENDRICK, J.—The action was for work, labor, and services and material furnished. It was claimed by the defendant on the trial that the work was ordered through one Max Cohen, and that the defendant had paid said Max Cohen in full therefor, and in substance that there were no contractual relations known to defendant between the plaintiff and defendant. The plaintiff, on the other hand, claimed that Max Cohen was the plaintiff's agent simply, and that he had no authority to receive payment for the work, labor, and services and materials rendered. Max Cohen was not a witness on the trial, and the affidavits upon which the motion for a new trial was based excuse his absence. Cohen's own affidavit used on the motion for a new trial shows that he was an important and material witness for the defendant. He states that he secured the order from the defendant; that he bought the material and did the work in connection

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with the plaintiff, and was financially interested in the transaction, and that the plaintiff was to receive only a commission; that he received payment for the goods and paid the plaintiff for the material furnished, whereupon he received a receipted bill, which was turned over to the defendant. He also stated that the plaintiff was paid for the material and work. The materiality of this testimony is apparent. Its probative force can be much better determined by a trial court than by the reading of affidavits.

The appellant objects that the motion should have been denied in the absence of a settled case. This undoubtedly is the practice in the Supreme Court; but the proper place to make that objection (if it be a valid objection in the Municipal Court) was upon the argument of the motion. The objection is taken too late on appeal. The court has power to entertain and decide a motion for a new trial on the ground of newly discovered evidence upon the pleadings and affidavits, in the absence of a settled case, where no objection is made on the argument of the motion that a settled case is necessary, under section 997 of the Code of Civil Procedure. Failing to object at that time, appellant waived the objection, and it cannot be raised for the first time upon the appeal. *Russell v. Randall*, 123 N. Y. 436; *McIver v. Hallen*, 50 App. Div. 441, 64 N. Y. Supp. 26; *Bantleon v. Meier*, 81 Hun, 162, 30 N. Y. Supp. 706.

It is also contended by the appellant that the defendant knew of the existence of the witness and of the relevancy of the alleged newly discovered evidence before the trial, and that, therefore, the motion should have been denied. The facts in relation thereto are in dispute, and, as these motions are largely addressed to the discretion of the justice hearing the motion, the exercise of that discretion will not be disturbed by an appellate tribunal, unless there has been an apparent abuse of it, which does not appear in this case.

We do not decide on this appeal whether or not a printed case is necessary in the Municipal Court upon which to

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base a motion for a new trial on the ground of newly discovered evidence, preferring to base our decision on the absence of a timely objection to the hearing of the motion on affidavits.

The order appealed from should be affirmed, with costs. All concur.

EDWARD A. BELL, ET AL., RESPONDENTS, v. KARSCH
BREWING CO. ET AL., APPELLANTS.*

SUPREME COURT, APPELLATE TERM, DECEMBER, 1906.

§ 2235.

*Landlord and tenant—Summary proceedings—Allegation of
petitioner's interest.*

An allegation in a petition in summary proceedings "that said petitioners are the landlords of the premises hereinafter described," is not a sufficient allegation of the petitioner's interest to confer jurisdiction upon the court to entertain the proceedings, under Code Civil Procedure, section 2235, which provides that the petition shall describe the interest of the petitioner and state the facts which authorize the application.

(Decided December, 1906.)

Appeal by defendants from an order in favor of plaintiff in summary proceedings for the recovery of real property. Reversed.

Mr. James I. Moore, for appellant.

Messrs. Gifford & Cox, for respondents.

* See note at end of case.

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GILDERSLEEVE, J.—This is a summary proceeding. The petition alleged “that said petitioners are the landlords of the premises hereinafter described.” This was the only allegation therein setting forth or attempting to set forth the interest of the petitioners in said premises as required by section 2235 of the Code of Civil Procedure. This statement has repeatedly been held to be insufficient to confer jurisdiction upon the court to entertain these proceedings. *Ferber v. Apfel*, 113 App. Div. 720, 99 Supp. 215, and cases there cited. Prompt objection to the form of the petition was made by the defendant herein, but without avail, and a final order in the landlord’s favor was made. It must be reversed.

Final order reversed, with costs to appellant. All concur.

**NOTE.—SUFFICIENCY OF STATEMENT OF PETITIONER’S
INTEREST OR OWNERSHIP IN PROCEEDINGS
TO REMOVE TENANT.**

- A. Statutory requirements.
- B. In general.
- C. Sufficient petitions.
- D. Insufficient petitions.
- E. Amendment.

A. Statutory requirements.

With reference to the contents of the petition in proceedings by a landlord or lessor for the removal of a tenant or the person who forcibly keeps the former out of possession, Code Civil Procedure, section 2235, provides that the applicant must present to the judge or justice a written petition, verified in like manner as a verified complaint, “describing the premises of which possession is claimed and the interest therein of the petitioner, or the person whom he represents.”

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B. In general.

It was not necessary, said the court in *Norsworthy v. Bryan*, 33 Barb. 153, decided in 1860, to state in the affidavit in summary proceedings how the landlord acquired title to the premises.

Under Code Civil Procedure, section 2235, there is no distinction regarding the description of the petitioner's interest in the premises, whether the proceedings are founded upon forcible entry and detainer, for nonpayment of rent, or for a holding over. *Loft v. Kaziz*, 84 N. Y. Supp. 228.

C. Sufficient petitions.

A petition reciting that the petitioner was "the agent, in respect to the premises hereinafter described, of the Equitable Life Assurance Society of the United States, who are the owners and landlords of the following premises," was held in *Equitable Life Assurance Society v. Schum*, 40 Misc. 657, 83 N. Y. Supp. 161, as setting forth sufficient facts to confer jurisdiction.

And in *Bennett v. Budweiser Brew. Co.*, 27 Misc. 805, 58 N. Y. Supp. 313, the court held to be sufficient, a petition averring "that your petitioner is the agent for P. B., who is the owner and landlord," and "that your petitioner is duly authorized to commence proceedings to dispossess said tenant and those claiming possession under said tenant."

An application stating that the petitioner is the agent for one H., who is the executor and trustee of one E. H., deceased, and who is empowered by the latter's will to sell and dispose of all of the real property of which he may die seised and to give good and sufficient deeds of the same, and further stating that petitioner had entered into an agreement with the tenant, was held in *Rowland v. Dillingham*, 83 App. Div. 156, 82 N. Y. Supp. 470, to be a sufficient allegation of "the interest of the petitioner or the person whom he represents."

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And a petition alleging that the petitioner became the owner of the premises by deed from a certain grantor (naming him) and that the defendant was in possession as tenant under an agreement of hiring, was held in *Griffin v. Barton*, 22 Misc. 228, 49 N. Y. Supp. 1021, to be sufficient. This case was affirmed in 27 App. Div. 632, 50 N. Y. Supp. 1127, Mem.

In *Earle v. McGoldrick*, 15 Misc. 135, 36 N. Y. Supp. 803, the court held sufficient, a petition alleging that petitioner became the owner of the premises by deed and that defendant was in possession under an alleged agreement or hiring with petitioner's grantor, and still occupied the premises.

In absence of any objection as to its sufficiency, the court in *Ward v. Burgher*, 90 Hun, 540, 35 N. Y. Supp. 961, regarded as sufficient, a petition for the removal of an under-tenant holding over, alleging that the petitioner was the owner of the premises and had rented them to a club, that the tenant leased from such club, and that he held over without permission.

D. Insufficient petitions.

The cases agree that a petition merely alleging that the petitioner is the landlord, is defective. *Kaziz v. Loft*, 81 App. Div. 636, 80 N. Y. Supp. 1015; *Loft v. Kaziz*, 84 N. Y. Supp. 228; *Ferber v. Apfel*, 113 App. Div. 720, 99 N. Y. Supp. 215; *Bell v. Karsch Brew. Co.*, 39 N. Y. Civ. Pro. R. 134; *Engel-Heller Co. v. Henry Elias Brew. Co.*, 37 Misc. 480, 75 N. Y. Supp. 1080, reversing 36 Misc. 851, 74 N. Y. Supp. 934 on another point. *Dreyfus v. Carroll*, 28 Misc. 222, 58 N. Y. Supp. 1116.

The statement that the petitioner is the landlord, said the court in *Engel-Heller Co. v. Henry Elias Brew. Co.*, 37 Misc. 480, 75 N. Y. Supp. 1080, is but a mere allegation of the relations of the parties, without setting forth, actually or by inference, a description of the petitioner's interest in the premises.

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In *Eldaen Realty & Const. Co. v. Bensamon*, 56 Misc. 463, 107 N. Y. Supp. 128, the petition setting forth in substance that the petitioner "is a lessee" by virtue of a lease of certain date, and that the landlord of whom petitioner leased the premises in question acquired title at a subsequent date, was held to confer no jurisdiction, since petitioner's interest did not appear.

A petition alleging that the petitioner is the lessee and landlord thereof, was held in *Ferber v. Apfel*, 113 App. Div. 720, 99 N. Y. Supp. 215, to be insufficient, since it asserts merely an interest, but not a description of such interest.

And a petition containing only the averment that "the petitioner is the lessee, and that as such he is the landlord of the demised premises," was held in *Loft v. Kaziz*, 84 N. Y. Supp. 228, to be insufficient.

In *Cohen v. Brossevitch*, 33 Misc. 600, 67 N. Y. Supp. 1025, the court held to be insufficient, a petition by one alleging that he was the agent for two persons, naming them, "landlord of the following premises."

And in *Cunningham v. Goelet*, 4 Denio, 71, the petition was as follows: "City and County of New York—*SS.* : Patrick Henry, agent for Peter Goelet, being duly sworn, doth depose and say." This petition was held to be defective.

A petition in which the petitioner describes himself as one of the trustees under the will of one H. A. C., but not claiming to be either the owner, landlord, or agent of the landlord, respecting the premises in question, and alleging that when the lease was made J. S. C. was the sole surviving executor and trustee under the will of H. A. C. and was one of the owners of the fee of the premises, was construed in *Cram v. Dietrich*, 38 Misc. 790, 78 N. Y. Supp. 948, as not showing that the petitioner had any interest in the premises.

A petition merely reciting that the applicant "is the tenant of the premises pursuant to an agreement with the landlord," was held in *Fuchs v. Cohen*, 22 N. Y. Civ. Pro. R. 269, to be defective. "An allegation of interest," said the

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court, "is not equivalent to a description of the interest." This was an action of forcible entry and detainer.

And a petition is insufficient which merely alleges that the plaintiff purchased the premises under foreclosure of a mortgage by proceedings taken as prescribed in title 9, chap. 17 of the Code of Civil Procedure, but which fails to state that the mortgage contained a power of sale and was recorded in the county where the property was situated, since in such a case only, can a mortgage be foreclosed under the statute. *Cowdrey v. Turner*, 85 Hun, 451, 32 N. Y. Supp. 889.

The court has no jurisdiction to act under a petition alleging that the petitioner "became entitled" to the premises in question "by virtue of a certain arrangement with the lessee thereof," pursuant to which he went into possession of the premises. *Potter v. New York City Baptist M. Soc.*, 23 Misc. 671, 52 N. Y. Supp. 294.

The same decision was rendered in *Ross v. New York City Baptist M. Soc.*, 23 Misc. 683, 52 N. Y. Supp. 303, with reference to a petition alleging that the petitioner is "a lessee of the premises under an agreement made between her and the respondent, by the terms of which the petitioner duly leased them from the latter, and by virtue of such agreement became entitled to, and went into possession of, said premises."

In *Schneider v. Leitzman*, 19 N. Y. Civ. Pro. R. 217, the court held that a petition in summary proceedings for forcible entry and detainer stating that the petitioner was "in peaceable possession and occupancy" of the premises "and lawfully entitled to remain and continue in possession thereof" is fatally defective.

An injunction was granted in *Cahill v. Wyand*, 22 N. Y. Civ. Pro. R. 271, restraining the execution of a warrant in summary proceedings for forcible entry and detainer, because the petition did not show the petitioner's interest in the premises.

The petition was dismissed in *Dougherty v. McMillan*, 25

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Misc. 782, 55 N. Y. Supp. 616, because it did not allege, nor show that the petitioner had any interest in the property.

E. Amendment.

The court has no power to amend a petition merely alleging that the petitioner is lessee and landlord, so as to show the petitioner's interest, since the defect is jurisdictional. *Ferber v. Apfel*, 113 App. Div. 720, 99 N. Y. Supp. 215. And an amendment of the petition to conform to the proof does not cure its insufficiency as failing to show the petitioner's interest.

**CAROLINE LJUNGQVIST, PLAINTIFF, v. JOHN
HARTMETZ ET AL., DEFENDANTS.**

NEW YORK CITY COURT, SPECIAL TERM, APRIL, 1907.

§ 3229.

Costs—Dismissal as to defendant answering separately.

Where a complaint is dismissed as to a defendant who answered separately, such defendant is not entitled to costs as a matter of course, but in such case costs may be awarded in the discretion of the court, under the provisions of Code Civil Procedure, section 3229.

Costs—Improper allowance—Remedy—Order.

Costs improperly awarded upon the dismissal of the complaint to a defendant who answered separately should be stricken from the judgment by an order for that purpose.

(Decided April, 1907.)

Order striking out improper allowance of costs. Order entered.

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Mr. John Loen, for plaintiff.

Mr. Herman Ellers, for defendants.

WADHAMS, J.—Where the complaint is dismissed as to a defendant who answered separately, such defendant is not entitled to costs as a matter of course, provided the plaintiff is entitled to costs against one or more defendants. In such case costs may be awarded in the discretion of the court. Code Civ. Pro., § 3229. As no application for an award of costs was made in this case, the judgment entered improperly awarded costs in favor of the defendant. The proper remedy in such case is an order striking from the judgment docketed and entered in favor of the defendant and against the plaintiff that portion thereof awarding costs of the action in favor of the defendant and against the plaintiff. *Eastman v. Gray*, 81 Hun, 362, 30 N. Y. Supp. 895.

Such order may be entered. Settle same on notice.

THOMAS C. ROWE, APPELLANT, v. WILLIAM E.
GRANGER ET AL., RESPONDENTS.*

SUPREME COURT, APPELLATE DIVISION, THIRD DEPART-
MENT, MARCH, 1907.

§ 3252.

Execution—Sale—Complete.

To consummate a sale pursuant to an execution held at public auction, three things are necessary: There must be a bidder, the property must be "struck off," and the bidder must complete his purchase by complying with the terms of the sale.

*On the subject of additional allowance of costs, see note in 33 N. Y. Civ. Pro. R., 470.

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Execution—Sale—For cash.

A sheriff who sells under an execution must sell for cash.

Execution—Sale—Incomplete.

A sale conducted by a sheriff under an execution is not completed where the bidder offered to pay the amount of his bid, but the sheriff told him to "let it go until to-morrow morning," so as to entitle him to the property upon making a tender of the price to the sheriff.

Bailment—Property left with sheriff.

A sheriff with whom property purchased at an execution sale is left until the next day is the bailee for the purchaser.

Costs—Separate bills of—Separate parties.

Defendants who appear and answered by separate attorneys are properly entitled to separate bills of cost, in absence of proof that the parties are united in interest or collusively appeared by separate attorneys in bad faith for the purpose of enhancing the costs.

Costs—Extra allowance—Discretion of trial court.

The question whether an action may be regarded as difficult and extraordinary within the meaning of Code Civil Procedure, section 3252, should be addressed to the discretion of the trial court. (*Decided March, 1907.*)

Appeal by plaintiff from a judgment of the Supreme Court of Albany County and from an order denying a motion for retaxation of costs. Affirmed.

Mr. Andrew J. Nellis, for appellant.

Mr. John Cadman, for respondents.

SEWELL, J.—The principal question in this case is whether the sale by the sheriff of the property in question was completed. The property was duly exposed for sale October 6, 1904, under executions issued against the property of the Yuengling Hudson New York Breweries, and was bid off by the appellant for about \$1,600. On the day

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of sale, the appellant offered to pay the amount of his bid, and the sheriff said: "Let it go until to-morrow morning. Then you can pay for it and take it away." The next morning, before the appellant offered to pay the amount bid, the property was taken from the possession of the sheriff by the coroner, under a requisition issued in an action in which the defendants herein were plaintiffs and the sheriff was defendant. The action was brought to trial, and a judgment was entered in favor of the defendant therein, which awarded him the possession of the property, or \$2,000, "in case the possession thereof is not delivered to the defendant." April 27, 1905, the plaintiffs in that action paid to the sheriff the amount directed to be paid in lieu of the delivery of the property, and retained possession. On the same day the plaintiff herein tendered to the sheriff the amount bid by him at the sale, less \$50 paid October 8, 1904, which the sheriff refused to receive.

The appellant contends that there was a valid sale of the property in question, and that it was complete when it was struck off to him. We are of the opinion that this claim is not well founded. It is not enough that property is bid off at a sale upon execution. The legal title is not divested or transferred, nor is the execution satisfied, by the single act of bidding it off. In such a sale, as in all sales at public auction, three things are necessary to consummate it: There must be a bidder, the property must be "struck off" or "knocked down," and the bidder must complete his purchase by complying with the terms of the sale. It is too well settled in this state to be questioned that a sheriff must sell for cash, that payment of the amount bid is one of the conditions of the sale imposed by law, and that, if a bidder to whom property is struck off refuses or omits to make payment, the sheriff must avoid the sale and resell it. This rule is intended to protect the defendant in the execution, as well as the judgment creditor, by securing to the former the continuing right of ownership until the amount bid for the property is actually paid.

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Applying this rule to the present case, it is seen that the appellant did not obtain title to the property in question, but only a right to acquire it by paying the purchase money and perfecting the sale, which it is admitted he did not do. This doctrine was held and expressed in the case of *Holmes v. Richmond*, 19 Hun, 634. In that case the sheriff offered the property for sale on an execution, and it was struck off to one Swinburne & Co., who said they were not ready to pay then, but would pay the bid in the morning when the banks were open, and the sheriff assented to giving them the time until the next morning at 10 o'clock. The next morning, before Swineburne & Co. appeared to pay their bid, one of the defendants in the execution appeared at the sheriff's office and paid the amount of the execution to the sheriff. Afterwards Swineburne & Co. appeared and offered to pay their bid, but the sheriff refused to receive it. The court, at General Term, said:

"We think the nonsuit was entirely correct. The first sale was not completed, but the sheriff gave the bidder time to pay the money bid, which he had no authority for doing. He could not make a valid sale except for cash, and the sale was not complete until the payment of the money bid."

It is not necessary, however, in order to support the judgment, to maintain that the appellant did not acquire a good title to the property. If it be assumed that the title to the property passed to him when it was struck off at the sale, that there was a constructive delivery to the sheriff, and the property was left with him to be delivered upon a subsequent occasion, it follows that the sheriff was a bailee, that he represented the appellant in the former action, and held the amount paid in satisfaction of the judgment recovered therein in trust for him. Under such circumstances there can be no doubt that the judgment bars this action as effectively as though the former action had been brought directly against the plaintiff herein. As was said by the court in *Baird v. Daly*, 57 N. Y. 245:

"A recovery, either by the bailor or the bailee, is a bar to an action by the other party." *Green v. Clark*, 12 N. Y. 343.

The appeal from the order denying the motion for a retaxation of costs presents the question whether the defendants, who separately appeared and answered, were properly permitted to tax separate bills of costs. The rule, in an action at law, is that defendants appearing and answering by separate attorneys are entitled to separate bills of costs, and that this right can only be defeated by showing that the parties are united in interest or collusively appeared by separate attorneys in bad faith for the purpose of enhancing the costs. *Williams v. Cassady*, 22 Hun, 182. No fact is stated in the affidavits submitted which justify the conclusion that the separate appearances were collusive or for the purpose of enabling the defendants to tax more than one bill of costs. They were not partners, and were under no obligations, either in law or fair dealing, to unite in their defense, and therefore are entitled to separate bills.

Whether this action should be regarded as difficult and extraordinary, within the meaning of section 3252 of the code, was a question addressed to the discretion of the trial court; and, as was said in *Byron v. Durrie*, 6 Abb. N. C. 140:

"The determination of the question usually involves so many considerations which are addressed to the discretion of the judges that the appellate court rarely interferes."

We think there was no abuse of discretion in the present case, and that the order denying retaxation, as well as the judgment herein, should be affirmed, with costs. All concur.

Matter of Lesser.

MATTER OF LESSER.

SUPREME COURT, APPELLATE DIVISION, SECOND DEPARTMENT, MAY, 1907.

§§ 388, 2606, 2726, 3333.

Executors and Administrators—Accounting—Limitations.

The right of an administrator, appointed upon the decease of a prior administrator, to compel the administrator of the latter to account, as authorized by Code Civil Procedure, section 2606, which provides: "Where an * * * administrator * * * dies, the Surrogate's Court has the same jurisdiction, upon the petition of his successor, * * * to compel the executor or administrator of the decedent to account, which it would have against the decedent if his letters have been revoked by a surrogate's decree, "is not barred by limitation until after the expiration of ten years from the appointment of the successor, under sections 388, 2726, and 3333.

(*Decided May, 1907.*)

Appeal from a decree of the Surrogate's Court of Kings County compelling an accounting. **Reversed.**

Mr. F. J. Moissen, for appellant.

Mr. Jacob Brenner, for respondents.

HOOVER, J.—Huldah Lesser died intestate in February, 1895. Letters of administration upon her estate were granted to Solomon Lesser on the 18th of February, 1895. This administrator did not file any inventory in the estate of Huldah Lesser, nor did he ever account as administrator. He died on the 20th day of May, 1905, intestate, and Ed-

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ward Lesser was, on the 9th day of January, 1906, appointed administrator of his estate. On the 27th day of February, 1906, Peter Lesser, the appellant, was appointed administrator of the estate of Huldah Lesser in the place of Solomon Lesser, deceased. On the 12th day of June, 1906, the appellant Peter Lesser, presented his petition to the Surrogate's Court, praying that a citation be issued to Edward Lesser, as administrator of the estate of Solomon Lesser, deceased, and to the sureties upon his bond, requiring them to show cause why Edward Lesser, as administrator of the estate of Solomon Lesser, deceased, should not file an account of the proceedings of the latter as administrator of the estate of Huldah Lesser, deceased. Upon that petition a citation was issued, and Edward Lesser, as administrator of the estate of Solomon Lesser, deceased, individually and as administrator, filed his answer, demanding that the proceeding be dismissed, for the reason that it had been commenced more than ten years after letters of administration had been granted to Solomon Lesser upon the estate of Huldah Lesser, deceased.

The learned surrogate took the view that the proceedings were barred by limitation of time, in that, pursuant to the provisions of section 2726 of the Code of Civil Procedure, the surrogate might have compelled a judicial settlement of the account of Solomon Lesser, as administrator, immediately after the expiration of one year from the day letters were granted to him, to wit, the 18th day of February, 1895, and that such a proceeding must be commenced within ten years after the right to such an accounting accrued. Code Civ. Pro., sections 388, 3333. The appellant's right to compel an accounting by the administrator of the estate of Solomon Lesser had not been barred by the limitation of time at the time his petition was presented, and the order should be reversed. Section 2606 of the Code of Civil Procedure provides:

"Where an * * * administrator * * * dies, the Surro-

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gate's Court has the same jurisdiction, upon the petition of his successor, * * * to compel the executor or administrator of the decedent to account, which it would have against the decedent if his letters have been revoked by a surrogate's decree.

It was held in *Matter of Rogers*, 153 N. Y. 316, that the right of the successor of a deceased executor to compel an accounting under the provisions of this section is not barred until after the expiration of ten years from the appointment of the new administrator. The reasons for the rule are fully stated in the opinion in that case, and they require that the order appealed from should be reversed.

Order of the Surrogate's Court of Kings County reversed, with costs, and proceedings remitted to the surrogate, to be disposed of in accordance with the opinion. All concur, except HIRSCHBERG, P. J., who dissents.

**FREDERICK W. GARDNER, PLAINTIFF, v. THE
ROYCROFTERS ET AL., DEFENDANTS.**

**SUPREME COURT, SPECIAL TERM, FRIE COUNTY,
MARCH, 1907.**

§§ 888, 894.

Depositions—Power of court.

The power of the court toward a commission depends entirely upon the provisions of the Code of Civil Procedure:

Depositions—Nonresident—Punishment for contempt.

Code Civil Procedure, section 888, subdivision 5, which authorizes a commission to take depositions without the state, "where an issue of fact has been joined in an action pending in a court of record and the testimony is material to the applicant in the pros-

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ecution or defense thereof," and section 894, which provides that where an issue of fact is pending, the court may direct that an open commission issue where the testimony is "material and necessary in the prosecution or defense of the action," do not authorize the issuance of a commission to take the testimony of a nonresident and absent witness for use on a motion to punish a party for contempt.

(*Decided March, 1907.*)

Application by plaintiff for a commission to take testimony without the state. Denied.

Messrs. Bissel & Riley, for plaintiff.

Messrs. Kenefic, Cook & Mitchell, for defendant.

BROWN, J.—The power of the court to award a commission depends solely upon the statute. It is the contention of the plaintiff that subdivision 5 of section 888 of the Code of Civil Procedure is authority under which the court may exercise the power to issue the commission prayed for. A careful examination of *Stake v. Andre*, 18 How. Prac. 159, *Crane v. Evans*, 18 Abb. N. C. 444, *Stubbs v. Ripley*, 39 Hun, 623, and *Matter of Plumb*, 64 Hun, 317, 19 N. Y. Supp. 79, satisfies me that a commission to take the testimony of witnesses without the state, for use in the state, under subdivision 5 of section 888 of the Code of Civil Procedure, can only be issued where the testimony is to be used upon the prosecution or defence of issues of fact joined in an action pending in a court of record. The language of the subdivision itself will not permit of any other meaning or construction. There must be issues of fact joined in an action pending in a court of record; that is, issues of fact joined in the prosecution of which the testimony is material to the applicant. This application is for a commission to take testimony of nonresident and absent witnesses material to a motion yet to be made to punish the defendant for contempt,

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upon which no issues have been joined. An open commission can only be had where the testimony is "material and necessary in the prosecution or defence of the action." Section 894. What action? An action pending in which issues of fact have been joined. Section 894. Subdivision 5 of section 888 is applicable only to actions when the application for a commission is made to the Supreme Court and other courts of record. There is no action pending to punish the defendant for contempt.

The application must be denied.

C. ADELBERT BECKER ET AL., RESPONDENTS, v.
MAGGIE MCCREA, ET AL., APPELLANTS.

SUPREME COURT, APPELLATE DIVISION, SECOND DEPARTMENT, APRIL, 1907.

§ 379.

Mortgages—Adverse possession—By mortgagee.

A mortgagor's assent to the mortgagee's possession is plainly inferable from a continued, open and notorious possession by the latter.

Adverse possession—By mortgagee.

A finding that a mortgagee's possession is adverse under Code Civil Procedure, section 379, is supported by proof that the mortgagee occupied the mortgaged premises, which had never been sold under the judgment of foreclosure, as a part of his farm for twenty years, that the tillable land was cultivated, the natural grass cut from the meadow, and timber taken from the woodland as occasion required.

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Adverse possession—By mortgagee—What is.

The term "adverse," as used in Code Civil Procedure, section 379, providing that an action to redeem real property from a mortgage may be maintained by the mortgagor against the mortgagee in possession, unless he has continuously maintained an adverse possession of the mortgaged premises for twenty years, only requires that the mortgagee be in possession rightfully as such. (*Decided April, 1907.*)

Appeal by defendants from a judgment of the Trial Term of Westchester County. Affirmed.

Mr. Brainard Tolles (Charles Francis Stone, on the brief), for appellants.

Mr. J. Addison Young, for respondents.

MILLER, J.—The respondents are the devisees of Jane B. Eddy, deceased, who in 1877 conveyed the property involved in this suit to one Bernard Spaulding, taking back a purchase-money mortgage. In the same year said Spaulding conveyed to the defendant McCrea. In 1878 an action to foreclose said mortgage was commenced and prosecuted to judgment, but there was no sale under the judgment. In 1904 said defendant McCrea attempted to convey an undivided eighth part of said premises to the plaintiff, evidently for the purpose of obtaining an adjudication of title in a partition suit, instead of in an ejectment suit or an action to redeem. The respondents assert that their testatrix was continuously in possession as mortgagee for more than 20 years, to wit, from 1879 to the commencement of this action, and that such possession ripened into title before the commencement of the suit, because an action to redeem was barred by section 379 of the Code of Civil Procedure. The trial court found that in the year 1879 said testatrix, with the knowledge and consent of said Spaulding and McCrea, entered into the open, actual, and visible possession and use

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of said premises, and so continued up to the time of the commencement of this action. The appellants challenge this finding of fact as unsupported by evidence and as inconsistent with the conclusion of law, also found, that the possession of said Eddy was adverse, and assert that the mortgage debt is conclusively presumed to have been paid.

We think the finding of fact referred to is abundantly supported by the evidence. It clearly appears that the defendant McCrea never made any claim to or asserted a right of possession in the property until shortly before the commencement of this action. It adjoined, and before the conveyance to said Spaulding in 1877 was a part of, a farm occupied by said Eddy, and the proof is that during the period in question it was occupied as a part of said farm, that the tillable land was cultivated, the natural grass cut from the meadow, and timber taken from the woodland as occasion required. To be sure, there is no direct evidence that said McCrea expressly assented to such possession; but such assent may be either express or implied, and is plainly inferable from the continued, open, and notorious possession of the mortgagee without objection thereto on the part of said McCrea. As said by Judge Finch, in *Howell v. Leavitt*, 95 N. Y. 617, the requisite "assent or acquiescence may be inferred from slight circumstances." It is conceded that there can be no presumption of payment if the mortgagee was in possession, and we think that the finding that the respondents' testatrix was for more than 20 years a mortgagee in possession is sufficient to support the judgment appealed from.

If I have correctly understood the argument of the learned counsel for the appellants, it is that the respondents cannot succeed unless they have made out a title by adverse possession, and it may be granted that they have not. This contention, however, is based on a misapprehension of the meaning of the word "adverse" as used in said section 379. I grant that the word is very inaptly used; but I think it

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obvious that it is not used in the same sense as in the preceding title, which prescribes the limitations of time for the commencement of actions for the recovery of real property. The title in which said section is found relates to actions other than for the recovery of real property. It is true that there is judicial warrant for the appellants' contention (*Kip v. Hirsh*, 21 Jones & S. 1; *Maurhoffer v. Mitnacht*, 12 Misc. Rep. 585, 34 N. Y. Supp. 439); but the decisions, relied on to support the judgments in those cases, were on other points. In the first place, the possession of the mortgagee cannot be strictly adverse, because, if he claims under title adverse to the mortgagor, he is not a mortgagee in possession. The mortgagee has no title to the mortgaged premises, either before or after default (*Trimm v. Marsh*, 54 N. Y. 599; *Ten Eyck v. Craig*, 62 N. Y. 406-422; *Rector, etc., Christ P. E. Church v. Mack*, 93 N. Y. 488-491); and if he be in possession, but not strictly as mortgagee, the mortgagor, unless he choose to treat him as such, may maintain ejectment, in which case section 365 of the Code of Civil Procedure, not section 379, would govern.

Counsel for the appellants justly commends a discussion in 26 Albany Law Journal, 526, and 27 Albany Law Journal, 10, on the subject "How a Mortgagee, as Such, can Get Possession," to which he refers in support of the proposition that the mortgagee can only get possession as such with the consent or acquiescence of the mortgagor. The soundness of that proposition is there clearly shown, both upon principle and authority; but that proves that the word "adverse" could not have been used in said section 379 in the sense now asserted. It would be a work of supererogation to review the authorities prior to *Dunning v. Leavitt*, 85 N. Y. 30, for the learned writer of those articles distinguished dicta from decisions with such thoroughness and discrimination as to make further analysis of those cases unnecessary. He showed that the Court of Appeals had to decide the point in *Dunning v. Leavitt*, *supra*. Subsequently

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the precise proposition was urged upon that court by said writer as counsel for the plaintiff in the ejectment suit brought by the heirs of Howell against the defendant in that case, and was squarely decided. *Howell v. Leavitt*, 95 N. Y. 617. This court, in this department, said that that case settled the law "that, where the owner of the equity of redemption is not a party to a decree in foreclosure, the foreclosure is void, and the purchaser does not become even a mortgagee in possession." *Beebe v. Richmond Power Co.*, 6 App. Div. 187, 40 N. Y. Supp. 1013. Upon slight examination it may seem that *Townshend v. Thomson*, 139 N. Y. 152, decided the question the other way; but a careful reading of the opinion of Judge Earl in that case discloses that he did not overlook the fact that the assignee in bankruptcy of the mortgagor acquiesced in the entry of the purchaser at the void foreclosure sale. Therefore, when that learned judge said that such purchaser "becomes assignee of the mortgage, and if he lawfully enters into possession of the real estate purchased he becomes a mortgagee in possession," he used the word "lawfully" with discrimination; for, of course, the entry of a purchaser at a void foreclosure sale without the consent or acquiescence of the mortgagor could no more be lawful as to him than such entry by any trespasser.

We have not overlooked the decision in *Barson v. Mulligan*, 66 App. Div. 486, 73 N. Y. Supp. 262. There was a strong dissent in that case, and a majority of the court assumed that *Winslow v. Clark*, 47 N. Y. 263; *Hubbell v. Sibley*, 50 N. Y. 470; *Madison Ave. Bapt. Ch. v. Oliver St. Bapt. Ch.*, 73 N. Y. 94, and *Townshend v. Thomson*, *supra*, went further than they actually did. The effect of the decisions in the first three cases referred to is shown in 26 and 27 *Albany Law Journal*, *supra*, and in the last case referred to the assignee of the mortgagor consented to possession by the mortgagee as hereinbefore shown. We may take it as settled, then, that a mortgagee as such in pos-

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session neither has title nor holds adversely to the title of the mortgagor; and we will not assume that the Legislature intended to prescribe by said section 379 a limitation which could never commence to run. Before the Revised Statutes, equity applied the same limitation to an action to redeem as the law applied to an action in ejectment; *i. e.*, 20 years. *Demarest v. Wynkoop*, 3 Johns. Ch. 129; *Moore v. Cable*, 1 Johns. Ch. 385. The Code of Procedure contained no specific provision respecting an action to redeem, and it was held that section 97, the general section prescribing the period of 10 years, applied (*Hubbell v. Sibley*, *supra*); and, of course, said section 379 of the Code of Civil Procedure was intended to restore the old rule. The word "adverse" must, therefore, be given a meaning consistent with the intent and purpose of the section, and can only require that the mortgagee be in possession rightfully as such.

The judgment should be affirmed, with costs. All concur.

GEORGE KAPLAN, RESPONDENT, *v.* ISSAC L. SHAPIRO ET AL., APPELLANTS.

NEW YORK SUPREME COURT, APPELLATE TERM,
APRIL, 1907.

§§ 1942, 1946.

Trial—Instructions—Verdict contrary to.

Where a jury have found a verdict contrary to the instructions of the court, it will be set aside without regard to the legal accuracy of the instructions, but only the party injuriously affected by the disobedience of the jury has the right to complain.

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Appeal—Reversal—Failure to object on trial.

The appellate court is not justified in reversing a judgment for a failure to object to the instructions by the court.

Partnership—Liability—Composition and creditors.

Partners are jointly and severally liable, and payment by one partner of his part of the liability and his consequent release from the partnership debt, do not, without more, discharge the other partner from his share of the indebtedness, under Code Civil Procedure, section 1942, which provides that a joint debtor may make a separate composition with his creditor and that such a composition discharges the debtor making it, and him only.

Same.

Under Code Civil Procedure, sections 1942 and 1946, firm creditors may compromise with one of the partners without releasing the other from the residue of the demand or precluding a continuance of the action against him.

(Decided April, 1907.)

Appeal by defendants from judgments of the Municipal Court, Borough of Manhattan, Thirteenth District, rendered in favor of plaintiff. Affirmed.

Mr. Henry Leib, for appellant.

Messrs. Feltenstein & Rosenstein (Moses Feltenstein, of counsel), for respondent.

GIEGERICH, J.—These three actions were tried together, but a separate judgment was entered in each. They are brought upon promissory notes made by the defendants Isaac L. Shapiro and Michael Edelstein, as copartners doing business under the firm name of Shapiro & Edelstein, to the plaintiff. The note sued on in action No. 1 (calendar No. 80) is dated December 1, 1890, and is for \$200, payable one month after date; the one in No. 2 (calendar No. 81), dated October 3, 1890, is for \$241.86, payable four months after date; and the one in No. 3 (calendar No. 82) is dated October 3, 1890, and is for the payment of \$250 within ninety

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days after date. The notes in suit are annexed to the return in action No. 2. The defendants answered separately in each action; Shapiro pleading a general denial and the statute of limitations, to which Edelstein in his answer added a plea of release and payment. Upon the trial the plaintiff testified that after the expiration of six years from the maturity of the notes, viz., in January, 1902, the defendant Shapiro paid to him sums aggregating \$55 on account of the notes in suit and promised to pay the balance due thereon. There was, however, no proof offered that the defendant Edelstein participated in such payments or made any new promise to pay the notes; and so the complaint was dismissed as to him. The defendant Shapiro, testifying in his own behalf, denied that he made any payment on account of the notes, or that he promised to pay the same, and he showed by the testimony of Edelstein and of Edelstein's brother, Louis, that after the dissolution of the partnership, viz., on November 12, 1891, Edelstein, in the presence of Louis, paid to the plaintiff the sum of \$346, in bills, and obtained the following receipt:

“ New York, November 12, 1891.

“ Recd. three hundred and forty-six (\$346 00-100) for his part of payment from ther padnership of Shapiro & Edelstein.

“ [Signed]

George Kaplan.”

Edelstein and his brother testified that when that payment was made he asked the plaintiff how much he owed him, and the plaintiff named the sum above mentioned, which was thereupon paid. The plaintiff and his wife, on the other hand, gave testimony to the effect that when the receipt was given no money whatever was paid, and that the receipt was given merely for the purpose of being shown to his then intended father-in-law, from whom he expected to receive \$2,000 upon his marriage, and who, upon learning of his indebtedness to the plaintiff, inquired of him about it and was informed that it had been paid.

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The justice, adverting to the foregoing testimony relative to the defense of release, charged the jury in substance that if they believed the plaintiff received the sum of money called for by the receipt claimed to have been given by him to Edelstein, their verdict should be for the defendant. The plaintiff duly excepted to such instruction. The jury, having returned from their deliberations, through their foreman announced, "We find that the man shall pay each and every note," and the court thereupon directed them to retire in order to bring in a proper verdict. The jury returned and rendered the following verdict: "We find that the man shall pay on the face of each and every note, and deduct the \$346 and \$55." The defendant Shapiro thereupon moved to set aside the verdict, upon the various grounds specified in section 254 of the Municipal Court act (Laws 1902, p. 1563, c. 580), which motion was subsequently denied, and judgment was entered in each action in favor of the plaintiff after deducting pro rata the sums above mentioned. The defendant Shapiro has appealed to this court, and urges that the verdict of the jury is contrary to the above instructions of the court, and that the judgment should consequently be reversed.

While such course would undoubtedly follow where the instruction is correct (*Bigelow v. Garwitz*, 15 N. Y. Supp. 940; 11 Ency. Pl. & Pr. 60), there is quite a diversity of opinion, in jurisdictions other than our own, where the charge is incorrect; the courts in some states holding that the judgment must be reversed, while in others there are decisions which maintain the contrary view (11 Ency. Pl. & Pr., p. 60, and citations). In this state, however, the rule is fairly deducible from the adjudications that, where a jury have found a verdict contrary to the instructions of the court, it will be set aside, without regard to the legal accuracy of the instructions, but that only the party injuriously affected by the disobedience of the jury has the right to complain. In *Sweetman v. Prince*, 62 Barb. 256, it was

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held that the jury were bound to take the law from the court, and could not disregard an instruction upon that subject, however erroneous it might be, and that, if they found a verdict contrary to such instructions, it was the duty of the court to set it aside. The case just cited was reversed on another point (26 N. Y. 224), but it is quoted with approval by Mr. Baylies, in his very useful work on New Trials and Appeals (2d Ed., p. 542). The doctrine of that case, although the case itself is not mentioned in the opinion, seems to have been approved by the Court of Appeals in *Wood v. Belden*, 54 N. Y. 658, with the limitation, however, that only the party injuriously affected by the disobedience of the jury has the right to complain. See Baylies' *New Trials and Appeals* (2d Ed.), p. 542.

The accuracy of the instruction given to the jury as above noted is questioned by the appellant; but, since he did not except to it upon the trial, we would not be justified in reversing the judgment upon that ground. *Muessnan v. Met. St. Ry. Co.*, 76 App. Div. 1, 78 N. Y. Supp. 571. Recourse must therefore be had to the record, with a view of ascertaining whether or not in any aspect of the case, the appellant has really been harmed by the instruction referred to, although the legal proposition therein contained may not have been correct; and, if he has not, then under the rule above stated, the error may be disregarded. It will be seen, from a reading of the paper claimed to have been given by the plaintiff to Edelstein, which is annexed to the return in action No. 2 (calendar No. 81) and is above set forth, that it is a mere receipt for the payment of the latter's part of the liability on the notes in suit, and that in the light of the authorities hereafter cited it cannot fairly be construed as a release of the entire indebtedness. Partners are jointly and severally liable, and the payment by one partner of his part of the liability and his consequent release from the partnership debt do not, without more, discharge the other partner from his share of the indebtedness, as will be seen from the following pro-

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visions of section 1942 of the Code of Civil Procedure, viz:

"A joint debtor may make a separate composition with his creditor, as prescribed in this section. Such a composition discharges the debtor making it; and him only. The creditor must execute to the compounding debtor a release of the indebtedness, or other instrument exonerating him therefrom. A member of a partnership cannot thus compound for a partnership debt until the partnership has been dissolved by consent or otherwise. In that case the instrument must release or exonerate him from all liability incurred by reason of his connection with the partnership. An instrument specified in this section, does not impair the creditor's right of action against any other joint debtor, or his right to take any proceeding against the latter; unless an intent to release or exonerate him appears affirmatively upon the face thereof."

The Appellate Term, in *Siefke v. Minden*, 40 Misc. Rep. 631, 634, 83 N. Y. Supp. 71, 73, construing this section, through Mr. Justice Gildersleeve, said:

"Section 1942 authorizes a creditor to compromise with one joint debtor upon releasing him from the joint obligation, without releasing the other joint debtor, and to compromise with a partner, after the dissolution of the copartnership, upon giving him a discharge from all liability as partner to the plaintiffs, with the same effect."

There the plaintiffs, as executors, sued two partners, after dissolution of the partnership, for rent and water rates under a lease from the former's testator to the latter. The action having been severed, a judgment was recovered against one of the partners for \$950.81, and the plaintiffs accepted from him \$500 in satisfaction of the judgment as to him. Thereafter a supplemental complaint was served, and the result was a verdict for the plaintiffs against the other partner by direction of the court. On appeal it was held that the defendants were joint debtors, as well as partners between themselves, and that, within sections 1942 and 1946 of the Code

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of Civil Procedure, the plaintiffs could compromise with one of the partners without releasing the other from the residue of the demand or precluding a continuance of the action against him.

It thus appears from these authorities that the alleged payment by Edelstein to the plaintiff of a part of the partnership debt did not operate as a release of the appellant from the other part thereof. Assuming, therefore, as we must from the finding of the jury, that such payment has been established, and that all other controverted questions of fact have been resolved in plaintiff's favor, it is manifest that the verdict which was rendered is right. Under these circumstances there is no just cause for complaint on the part of either party, especially by the appellant, who, as above shown, had only pleaded the statute of limitations in addition to a general denial, and, therefore, under the form of his answer, he would not, but for such instruction, have been in a position to avail himself of the payment so made by his former partner. The appellant was therefore the gainer, and not the loser, by the instruction, since it resulted in the jury deducting from the partnership debt the part so paid by Edelstein, which could not have been done but for such instruction. From all this, it is evident that the appellant was not injuriously affected by the jury's disregard of the instruction, but, on the contrary, he profited by it, and has no right to complain.

The several judgments appealed from should therefore be affirmed, with costs. All concur.

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MUTUAL LIFE INSURANCE CO., RESPONDENT, v.
ROBERT A. GRANNISS, APPELLANT.

SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT,
APRIL, 1907.

§§ 481, 546.

Pleading—Motion to make complaint definite and for bill of particulars.

A motion to make a complaint more definite, or in the alternative, for a bill of particulars are improperly joined, in that one may only be made before, and the other ordinarily only after, pleading.

Pleading—Bill of particulars—Motion before answer.

A motion for a bill of particulars made before answer, is premature, it not being shown to be necessary to enable the defendant to plead.

Pleading—Definiteness.

The controlling consideration in deciding whether a complaint should be made more definite is whether it contains a plain and concise statement of the facts constituting a cause of action, as required by Code Civil Procedure, section 481, and is prescribed in section 546, which authorizes the court to require a pleading, the allegations of which are "so indefinite or uncertain that the precise meaning or application thereof is not apparent," to be made more definite.

Pleading—Definiteness—Election.

An allegation in a complaint that the defendant, acting in concert with certain other officers of an insurance company and in disregard of his duty to plaintiff to preserve its property from waste, approved and participated in paying out a certain amount of its funds for political campaign purposes, which were wholly unauthorized, show a cause of action for wrongful acts as agent of the

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company, and for mere negligence, and as a cause of action upon either theory might arise on such facts, plaintiff should not be required, at a time when the exact facts are not known, to make an election by making the complaint more definite, as required by Code Civil Procedure, section 546.

(*Decided April, 1907.*)

Appeal by defendant from an order of the Special Term of New York County denying a motion to make the complaint more definite, or in the alternative, a bill of particulars. Affirmed.

Messrs. Charles J. Fay (Charles E. Miller, on the brief), for appellant.

Messrs. Joseph H. Choate (James McKeen and Joseph H. Choate, Jr., on the brief), for respondent.

LAUGHLIN, J.—The motion to make the complaint more definite and certain, or, in the alternative, for a bill of particulars, were improperly joined, because one may only be made before the other ordinarily only after pleading. Moreover, the motion having been made before defendant answered, and before it was rendered certain that the material allegations of the complaint would be controverted, and a bill of particulars not having been shown to be necessary to enable defendant to plead, it was premature, in so far as it demands a bill of particulars, and was, therefore, in that regard properly denied, without prejudice to renewal after issue joined. *American Credit Indemnity Co. v. Bondy*, 17 App. Div. 328, 45 N. Y. Supp. 267. The controlling consideration in deciding whether a complaint should be made more definite and certain is whether it contains a plain and concise statement of the facts constituting the cause of action, as required by section 481 of the Code of Civil Procedure, and is prescribed in section 546 of the same Code, which authorizes the court to require a pleading, the allegations of which are "so indefinite or uncertain that the precise meaning or application thereof is not apparent," to be made

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more definite and certain. The court may require that allegations with respect to the nature of the charge be made definite; but neither particulars nor circumstances of time and place should be required. *Tilton v. Beecher*, 59 N. Y. 176, 183; *People v. Tweed*, 63 N. Y. 194. The remedy is prescribed to enable a party, before pleading, to ascertain the charge made against him with sufficient definiteness to enable him to properly plead.

The action is at law to recover damages, for a breach or neglect of duty of the defendant as a trustee of plaintiff, a domestic life insurance corporation, holding office continuously, under six successive elections, from the 1st day of June, 1885, to the 28th day of March, 1906, and as a vice-president of plaintiff from the 16th day of December, 1885, to said 28th day of March. Plaintiff alleges for its first cause of action that it was the duty of the defendant, as trustee and vice-president, among other things, to preserve the assets of the company from waste, to neither authorize nor make, nor knowingly or negligently permit to be made, any unlawful or improvident use of its funds, and to be diligent, vigilant, and faithful in the discharge of his duties; that as vice-president it was his duty to examine, and approve or disapprove in writing, bills and vouchers for disbursements, and that he knowingly or negligently approved and recommended for payment a large number of bills and vouchers which were not proper charges against the company, to its damage in the sum of \$200,000. These facts plainly show a cause of action for general damages for wrongful acts or negligence as agent of the company, and amounts lost by the company through such wrongful acts or negligence are evidences of the damages; but are not specifically recoverable. *Manual Life Insr. Co. v. McCurdy*, 118 App. Div. 815, 103 N. Y. Supp. 829. It was not necessary, therefore, to allege the dates or amounts of the payments, or the facts with respect to each. That information may, in a proper case, be obtained by a motion for a bill of particulars after issue joined.

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Plaintiff for its second cause of action further alleges that in the years 1896, 1900, and 1904 defendant, acting in concert with certain other officers of the company and in disregard of his duty to plaintiff to preserve its property from waste, approved of and participated in paying out \$92,000 of its funds for political campaign contributions, which were wholly unauthorized. These allegations show a cause of action both for mere negligence and for wrongful acts as agent of the company; and as a cause of action upon either theory might arise on those facts, plaintiff should not be required, at this time, at least, to make an election by making the complaint more definite and certain. *Mutual Life Ins. Co. v. McCurdy*, *supra*.

In the fifth count plaintiff further alleges that during the period from January, 1900, until the close of the year 1905, defendant acted in concert with certain officers of the company, who, without authority and pursuant to a preconcerted arrangement, established and maintained with plaintiff's moneys a "confidential fund," which they disbursed without authority and for unlawful purposes; that plaintiff knew, or should have known, these facts; and that, acting in concert with them, he approved of and participated in the establishment, maintenance, and disbursement of said fund, and neglected to perform his duty to prevent, or attempt to prevent, such waste of funds of the company, or to give notice to plaintiff's board of trustees and to its policyholders, to its damage in the sum of \$600,000. The reason already assigned for denying the motion as to the second cause of action is controlling here, and leads to a like decision.

It follows that the order should be affirmed, with \$10 costs and disbursements. All concur.

Chorrmann et al. v. Bachmann et al.

PHILIP CHORRMANN ET AL., APPELLANTS, v. ANNA
BACHMANN ET AL., RESPONDENTS.

SUPREME COURT, APPELLATE DIVISION, SECOND DEPART-
MENT, APRIL, 1907.

§§ 382, 388.

Trusts—Sale of trust property—Voidable.

A conveyance of trust property by a trustee to another who at once reconveys to the trustee individually, is voidable at the election of the beneficiaries.

Fraud—Burden of proof.

Actual fraud is not presumed and the burden of proof is on the person alleging it.

Limitation of actions—Trust property.

The ten year period of limitation provided for in Code Civil Procedure, section 388, and not the limitation prescribed by section 382, subdivision 4, is applicable to an action respecting a conveyance by a trustee of trust property to another who immediately reconveyed to the trustee individually.

(Decided April, 1907.)

Appeal by plaintiff's from a judgment of the Special Term of Richmond County in favor of defendants. Affirmed.

The following is the opinion at Special Term:

That the conveyance of the premises in question on December 2, 1885, by Joseph Lewis, as trustee under the will of Philip Chorrmann, deceased, to Frederick Bachmann, and the reconveyance by Bachman to Lewis individually on the same day, was a constructive fraud, and that the transaction was not void, but merely voidable at the election of the

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plaintiffs, who were beneficiaries under the will, is virtually admitted by all parties, and is in harmony with well-settled principles. *Read v. Knell*, 143 N. Y. 484. It is claimed by the plaintiffs that, notwithstanding the lapse of time which would ordinarily bar the maintenance of the action upon that theory, the facts are that the transaction consists of more than a constructive fraud, and that the premises were acquired by Lewis at a price substantially less than their value, thus making his act one of actual fraud, and that knowledge of the facts constituting the fraud did not come to the plaintiffs until about three months prior to the commencement of the action. If this contention of the plaintiff is sustained, the lapse of time has not barred the action; but if, on the other hand, the evidence admits only of the finding of constructive fraud, the operation of the statute of limitations must result in a dismissal of the complaint. *Yeoman v. Townsend*, 74 Hun, 625, 26 N. Y. Supp. 606; *Smith v. Hamilton*, 43 App. Div. 17, 59 N. Y. Supp. 521.

When actual fraud is alleged, it will not be presumed, and the burden of proof is upon the parties alleging it. *Authorities supra*. The plaintiffs have sought to show, as proof of actual fraud, that at the time of the sale by Lewis as trustee to himself the premises had an actual market value substantially in excess of \$6,000, the consideration expressed in the deeds, and for which Lewis had actually accounted and paid over to the plaintiffs. Careful consideration has been given to the evidence bearing upon this question, and I have concluded that the plaintiffs not only have not maintained this burden, but that the greater weight of credible testimony warrants the finding that the sum named was at the time the fair value of the premises. Hence actual fraud has not been shown or found, the 10-year limitation provided for in section 388 of the Code of Civil Procedure is applicable, and not the limitation prescribed by subdivision 4 of section 382.

It follows that the plaintiffs' complaint should be dis-

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missed, with costs. Let the proposed findings and judgment be settled before me on notice of two days.

Mr. Frederick W. Clifford (Henry H. Sawyer, of counsel),
for appellants.

Mr. Henry Frankenberg, for respondents.

PER CURIAM.—Judgment affirmed, with costs, on the opinion of Mr. Justice GARRETSON at Special Term.

**CHARLOTTE E. MANEY, RESPONDENT, v. GEORGE
W. MANEY, APPELLANT.**

**SUPREME COURT, APPELLATE DIVISION, THIRD DEPARTMENT,
MAY, 1907.**

§ 1772.

Husband and wife—Separation agreement—Validity.

An agreement to separate made between husband and wife while they are living together and without the intervention of a trustee, pursuant to which they lived apart, is invalid, and no bar to an allowance for alimony in a subsequent divorce.

Divorce—Alimony—Security.

Under Code Civil Procedure, section 1772, it is within the discretion of the trial court to require security for the payment of alimony. (*Decided May, 1907.*)

Appeal by defendant from a judgment directing the payment of alimony. Affirmed.

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The action is for an absolute divorce. After a verdict in favor of the plaintiff upon specific questions submitted to the jury, an application was made to the court for an interlocutory judgment of divorce and for permanent alimony. Upon such application the defendant's counsel presented to the court an agreement between the parties, dated June 16, 1905, providing for a separation and for the payment by the defendant of the sum of \$144 per year for the support and maintenance of the plaintiff, and urged that this agreement was a bar to the granting of permanent alimony by the court in the action. The court, however, granted alimony to the plaintiff at the rate of \$5 per week, and directed that the defendant should furnish security for such payment, and from the provisions to this effect contained in the interlocutory judgment the defendant has appealed.

Messrs. John W. Lyon and Frances D. Lyon, for appellant.

Mr. Frank S. Anderson, for respondent.

CHESTER, J.—It appears very clearly, by the affidavits before the court upon the application for the interlocutory judgment, that at the time of the execution of the separation agreement between the plaintiff and defendant they were living together as husband and wife, and that after the execution of such agreement, and pursuant to the terms thereof, they separated and have ever since lived apart from each other. The agreement was made without the intervention of a trustee. No reason is given for the separation in the agreement, except a statement therein that differences have arisen between them, for which reason they have consented and agreed to live separate and apart from each other during their natural lives. The agreement under the authorities was void and consequently did not stand in the way of the court making proper provision for the support and maintenance of the wife in the interlocutory judgment, for the reason that it was

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made directly between the husband and wife before they had separated, and expressly for the purpose of bringing about a separation. *Poillon v. Poillon*, 49 App. Div. 341, 63 N. Y. Supp. 301; *Tallinger v. Mandeville*, 48 Hun, 152; *Whitney v. Whitney*, 4 App. Div. 597, 36 N. Y. Supp. 891, 39 N. Y. Supp. 1136.

The appellant is not aided by the provisions of section 21 of the domestic relations law (Laws 1896, p. 220, c. 272) enlarging the rights of a married woman and authorizing her to make contracts in respect to her property with any person, including her husband, for the reason that such section in express terms prohibits a husband and wife from contracting to alter or dissolve the marriage between them or to relieve the husband from his liability to support his wife. In *Poillon v. Poillon*, above cited, it is said, with reference to said section 21 and to a contract like the one under consideration here;

"It needs no discussion to show that this contract is essentially one to alter the marriage relation. It relieves the parties from the duty of living together, which the marriage relation imposes upon them, and tends to relieve the husband from the support of his wife, and, so far as it had these ends in view, it is directly contrary to the section above."

The authorities cited by the appellant are not contrary to this view, for they were either cases where the separation existed as a fact before the agreement was entered into, or where there was an intervention of a trustee, so the contract was not directly between the husband and wife.

We think, too, that the defendant was properly required to give security for the payment of the alimony. Under section 1772 of the Code of Civil Procedure, that was a matter resting entirely in the discretion of the court, and such discretion was properly exercised in this case.

The interlocutory judgment should be affirmed, with costs.

Talbot v. Laubheim.

WILLIAM H. TALBOT, RESPONDENT, v. MAX LAUBHEIM ET AL., APPELLANTS.

NEW YORK COURT OF APPEALS, MAY, 1907.

§ 829.

Pleading—Answer—Who bound by allegations.

Admissions contained in a verified counter-claim in an action for goods sold and delivered, which admit that the goods in question were delivered, are admissible in evidence against all of the defendants joining in the answer, and not against that defendant alone who verified the answer.

Evidence—Witnesses—Code Civ. Pro., sect. 829.

An officer of the corporation who acted for the plaintiff in an action brought against the members of a firm to recover for goods sold and delivered to them, is not incompetent, under Code Civil Procedure, section 829, where the corporation has ceased to do business, to testify as a witness for plaintiff as to conversations had with a deceased member of the firm relative to the sale of the goods in question, by reason of the fact that if the plaintiff failed to recover in the action by reason of any mistake or fault on the part of the corporation, the damage or loss would be charged against such corporation.

(*Decided May, 1907.*)

Appeal by defendants from a judgment of the Appellate Division, First Department, affirming a judgment in favor of plaintiff. Affirmed.

Mr. Louis Zinke, for appellant.

Mr. George C. Harrison, for respondent.

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CHASE, J.—This action is brought for goods sold and delivered by the plaintiff's assignor to the defendants as originally named in the action. The defendant Samuel Laubheim died after the commencement of the action, and by consent the administrators with the will annexed of said Samuel Laubheim, deceased, were substituted as defendants in his place and stead. The defendants appeared generally and interposed an answer to the plaintiff's complaint, in which they denied the material allegations thereof, and also alleged therein certain defenses and counter-claims. On the trial the plaintiff produced evidence showing that his assignor from time to time furnished bullion for the Camm Watch Case Company, a corporation, and that said watch case company solicited orders for watch cases that it might make the same from the bullion so furnished by the plaintiff's assignor, and that the plaintiff's assignor paid for the manufacture of said cases and carried out the contracts so made by the watch case company in his name. The secretary and treasurer of said watch case company, acting for the plaintiff's assignor, agreed with said Samuel Laubheim to make 75 plain watch cases at a price named. The cases were subsequently made and delivered to plaintiff's assignor. Plaintiff's assignor sent the watch cases, with a bill therefor, to be delivered to Laubheim Bros., in New York City. Subsequently the plaintiff, who is his assignor's general manager in the assignor's business in New York City, saw all, or nearly all, of the cases in the safe at the store of Laubheim Bros. The plaintiff then offered in evidence from the answer of the defendants the following allegation: "That in violation of the contract or agreement under which the aforesaid cases were sold and delivered to these defendants." The remaining part of the paragraph of the answer from which the alleged admission is taken is as follows: "There was charged, and the defendants are informed and verily believe, there is included in the amount claimed in the complaint herein the sum of \$14.77 for alleged overweight, and

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that, in fact, there was no overweight in the said goods; and that these defendants therefore likewise counter-claim and set off said sum of \$14.77 against any recovery that may be had by the plaintiff herein." The parties rested, and the court directed judgment in favor of the plaintiff for the amount claimed by him, less \$14.77, the amount so alleged in the answer as a counter-claim, and from the judgment entered thereupon an appeal was taken to the Appellate Division of the Supreme Court, where the judgment was unanimously affirmed (111 App. Div. 915, 96 N. Y. Supp. 1148), and from such judgment of affirmance the appeal is taken to this court.

The defendants claim that the plaintiff failed to prove a cause of action. The evidence was fragmentary, disconnected, and not very conclusive, but we are unable to say that there is not some evidence to sustain the judgment directed by the court. The defendants also claim that errors were committed by the trial court in its rulings:

1. In allowing admissions contained in the counter-claim to be considered as evidence on the trial of the action. A defendant may interpose as many defenses or counter-claims, or both, as he has, whether they are such as were formerly denominated legal or equitable (Code Civ. Pro., § 507), and, although an objection that the defenses or counter-claims are inconsistent is not available (Bruce v. Burr, 67 N. Y. 237; Societa Italiana v. Sulzer, 138 N. Y. 468), the pleading, so far as it alleges new matter constituting a defense or counter-claim, must contain a statement in ordinary and concise language of the facts claimed by the pleader. The practice under our Code of Civil Procedure does not recognize fictions or that a verified pleading can contain anything other than a truthful statement of the pleader's contention. There is no reason, therefore, why the allegations of a verified pleading, even if not conclusive against the pleader, should not be treated as admissions against the person or persons making them, the same as if made orally, or in any

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document or proceeding. The admissions in a pleading must be taken in connection with all the allegations thereof, and the weight to be given to admissions which are not in themselves conclusive against the pleader is to be determined by the court or jury the same as other evidence offered on the trial. Where all of the defendants unite in an answer, the admissions therein are to be treated in the action in which the pleading is served as the admissions of each, and not confined to the person actually verifying the same. We are not unaware of the fact that there are decisions which hold that an admission in a special defense or counter-claim cannot be considered for the purpose of overcoming the effect of a general denial. Such an admission is not conclusive as against a general denial, but we can see no reason upon principle why such an admission should not be considered with the other evidence received on the trial in deciding and determining the issues in the action. There are many reported cases sustaining the right to consider such admissions as evidence against the person or persons making them. *Cook v. Barr*, 44 N. Y. 156; *Young v. Katz*, 22 App. Div. 542, 48 N. Y. Supp. 187; *McIntire v. Wiegand*, 10 N. Y. Supp. 3; *Klein v. East River Electric Light Co.*, 90 App. Div. 92, 86 N. Y. Supp. 164, reversed as to the effect or weight of the evidence, 182 N. Y. 27.

2. In allowing the plaintiff's assignor to testify in regard to a conversation in the store of Laubheim Bros., in which Samuel Laubheim, now deceased, took part. The conversation referred to related to the defendant's alleged counter-claim for overweight charged by the plaintiff in this action. As the court allowed the defendants their entire alleged counter-claim for overweight, it is not necessary to consider the question as to whether the testimony of the plaintiff's assignor relating thereto should or should not have been admitted.

3. In allowing the secretary and treasurer of the *Camm Watch Case Company* to testify to conversations with Sam-

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uel Laubheim, now deceased. It is claimed by the defendants that such witness was interested in the event of the action by reason of the fact that, if the plaintiff failed to recover in the action against the defendants by reason of any mistake or fault on the part of the Camm Watch Case Company, the damage or loss to the plaintiff and his assignor by reason of such mistake or fault would be charged to said watch case company. The Camm Watch Case Company stopped business in 1901, and its assets were sold by the sheriff. The interest of the witness, if any, in that company, by reason of his being at the time its secretary and treasurer, is too remote, uncertain, and doubtful to make him interested in the event, within the meaning of section 829 of the Code of Civil Procedure. The true test of the interest of a witness is that he will either gain or lose by the direct legal operation and effect of the judgment, or that the record will be legal evidence for or against him in some other action. It must be a present, certain, and vested interest, and not an interest uncertain, remote, or contingent. 1 Greenleaf on Evidence, section 390.

The judgment should be affirmed, with costs.

CULLEN, C. J., and O'BRIEN, EDWARD T. BARTLETT,
HAIGHT, VANN, and HISCOCK, JJ., concur.

Judgment affirmed.

Dollard v. American Surety Co.

MARY DOLLARD, PLAINTIFF, *v.* AMERICAN SURETY CO., DEFENDANT.

NEW YORK CITY COURT, SPECIAL TERM, APRIL, 1907.

§ 511.

Costs—Bond—One action.

A plaintiff may recover in one action the costs awarded on appeal and costs awarded at the Trial Term, upon the breach of a bond conditioned for the payment of any costs.

Same.

If an obligor in a bond conditioned for the payment of any costs in an action, has a partial defense to the payment of costs awarded at the Trial Term, and costs awarded on appeal, or if it desires to offer judgment to the claim for either sum, it may do so without prejudice to the other, and the action may be severed and continued as to the balance, under Code Civil Procedure, section 511, which provides that where the answer admits a part of the plaintiff's claim the court may upon motion order that the action be severed.

(*Decided April, 1907.*)

Motion to compel plaintiff separately to state and number causes of action. Denied.

Mr. James A. Boylan, for plaintiff.

Messrs. Putney, Trombley & Putney, for defendant.

WADHAMS, J.—Motion to compel plaintiff to separate and number. The action is upon a bond given by certain plaintiffs in an action in the Supreme Court as security for costs. The bond is conditioned for the payment of any costs which might be awarded to this plaintiff in the Supreme Court

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action. Costs were there awarded both at Trial Term and upon appeal.

The plaintiff may recover in one cause of action both sets of costs. There is but one contract, namely, the bond; and it is for the breach of the terms of that contract that plaintiff brings this action. The fact that there are two counts for damage, both arising upon failure to perform the conditions of the one instrument, does not require the statement of two causes of action. The proof is in large measure the same. The separate items of damage always require different proof, and such different proof is not within the rule laid down in *Bell v. Merrifield*, 109 N. Y. 209. The defendant is not prejudiced. If it has a partial defense, it may plead it. If it desires to offer judgment to the claim for either sum entered as costs, it may do so without prejudice to the other, and the action may be severed and continued to the balance. Section 511 of Code Civ. Pro. Had the plaintiff brought action upon this bond, and not demanded all the damages to which he was entitled upon the breach of its terms, a second action upon the same instrument claiming further damages could not have been sustained. The fact that others may be entitled to share with the plaintiff in any recovery had upon this action concerns the plaintiff and such other claimants, and, if successful here, the plaintiff may possibly be called upon to account to those others in whose favor costs were also awarded; but such fact does not require the granting of the relief here prayed for, as it appears that the plaintiff was awarded costs and is pursuing the surety upon the bond securing the same.

Motion denied, with \$10 costs.

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**PEOPLE OF THE STATE OF NEW YORK, RESPON-
DENT, *v.* GEORGE B. MCCLELLAN, APPELLANT.**

**SUPREME COURT, APPELLATE DIVISION, FIRST DEPART-
MENT, MARCH, 1907.**

§§ 1948, 1986.

Quo warranto—Former determination—Objection.

The objection to a proceeding in the nature of quo warranto to test defendant's title to the office of mayor, that a former Attorney General had refused to bring such an action in the name of the people, is properly raised by a motion to set aside the service of the summons and complaint, and could not be taken by answer or by a plea in bar.

Actions—By Attorney General.

There is no provision in the Code of Civil Procedure which restricts the Attorney General in the exercise of his discretion as to whether an action by the people of the state shall or shall not be brought.

Quo warranto—Decision of Attorney General—Final.

A decision of the Attorney General not to bring an action in the nature of quo warranto to test a public officer's title to his office, as authorized by Code Civil Procedure, sections 1948 and 1986, is not a judicial determination, binding upon his successor.
(Decided March, 1907.)

Appeal by defendant from an order of the Special Term of New York County denying a motion to set aside service of a summons and complaint. Affirmed.

Mr. Eugene L. Richards, Jr., for appellant.

Mr. Charles A. Dolson, for respondent.

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INGRAHAM, J.—The people, by the Attorney General, commenced this action, alleging that an election was held in the city of New York on the 7th day of November, 1905, at which the defendant was declared elected mayor of said city, and has since occupied that office, but that at such election the greatest number of legal votes was cast for one William Randolph Hearst and he was duly and legally elected mayor of the city of New York for the term of four years commencing on the 1st day of January, 1906, that the defendant has usurped and intruded into and now holds such office of mayor of the city of New York, and judgment is demanded that said William Randolph Hearst be declared duly elected to the office of mayor, and that the defendant be ousted and excluded from said office. Upon an affidavit which alleged that on the 17th day of April, 1906, the said William Randolph Hearst, claiming that he had been elected mayor of New York at such election, petitioned Julius M. Mayer, then Attorney General of the state of New York, that he should bring or cause to be brought an action in the nature of *quo warranto* to test and determine the title of the defendant to the said office of mayor of the city of New York, that the defendant and the said Hearst duly appeared before the Attorney General upon that application and the Attorney General had a hearing thereon and received and took the proofs appertaining to the issues raised thereby, and, after due and deliberate consideration of the said petition, answer, and evidence so adduced before him, made a determination on the 16th of July, 1906, denying the application of the said William Randolph Hearst to have an action in the nature of *quo warranto* brought in the name of the people of the state of New York, and refusing to bring any such action, the defendant claims that such adjudication by the then Attorney General was *res adjudicata* as to whether an action should be brought by the people of the state to test the title of the defendant to the office of mayor under the election of the 7th of November, 1905, and becomes therefore binding upon

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the present Attorney General, successor to Attorney General Mayer, and that he had, therefore, no authority to commence this action, and upon this affidavit the defendant made a motion at Special Term that the service of the summons and complaint should be set aside and dismissed as unlawful and unauthorized. This motion was denied, and the defendant appeals.

The learned judge at Special Term denied the motion upon the ground that the question could not be raised on motion; that, if the contention of the defendant was available, it was only as a bar to the maintenance of the action, and that the bar must be pleaded by way of answer. I should be inclined to think that this objection could not be taken by answer or by a plea in bar, but could only be raised by a motion to set aside the service of the summons and complaint. There could be no question but that upon the allegations of the complaint the plaintiff has a good cause of action. Whether or not the people of the state of New York would enforce that cause of action was a question that was to be determined by the Attorney General under the provisions of the statute regulating the performance of his duties. If it was improper for the Attorney General to commence the action, or if there was any statutory or other bar to his using the name of the people of the state for that purpose, it would seem that the way that the question could be raised would be by a motion to set aside the service of process which was unauthorized by the people. The fact that the Attorney General had exceeded his authority in commencing the action in the name of the people of the state could not be available as a defense to the action, if the complaint set up a good cause of action. I think, therefore, that the question which we must determine is whether there was any determination of Attorney General Mayer which was a bar to his successor in acting under the authority vested in him by law in bringing this action.

Section 52 of the Executive Law (chapter 683, p. 1697,

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Laws 1892, as amended by chapter 821, p. 648, Laws 1895) provides that the Attorney General shall prosecute and defend all actions and proceedings in which the state is interested. He is therefore the law officer of the state, by whom all actions brought by or on behalf of the people of the state must be prosecuted. The action of *quo warranto* is regulated by title 1 of chapter 16 of the Code of Civil Procedure. Section 1948 provides that the Attorney General may maintain an action upon his own information or of a private person in either of the following cases:

“(1) Against any person who usurps, intrudes into, or unlawfully holds, or exercises within the state, a franchise or public office, civil or military, or an office in a domestic corporation.”

Section 1986 provides that:

“When an action is brought by the Attorney General, as prescribed in this title, on the relation or information of a person having an interest in the question, the complaint must allege, and the title of the action must show, that the action is brought upon the relation of that person.”

There is no provision of law which limits or restricts the Attorney General in the exercise of his discretion as to whether an action by the people of the state shall or shall not be brought. He can bring an action upon his own information, or on the complaint of another person; the only limitation on his action being that if it be brought on the complaint of another person that fact must appear in the complaint, and the Attorney General is then to require the party at whose instigation the action was brought to secure the state against any liability for costs. It seems to me that, in determining whether or not an action shall be brought, the Attorney General acts under a discretion vested in him by law, which is not in any sense made to depend upon the result of a judicial investigation, but is solely an exercise of the discretion vested in him as the law officer of the state. He may bring, and it is his duty to bring, the action when he is satisfied

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that the law has been violated and a person is exercising a public office or a public franchise without authority or legal title to the office or franchise. The question is one submitted to his discretion, and he must exercise that discretion upon the facts as they appear to him from time to time when brought to his attention. From the very nature of the discretion vested in him it seems to me impossible to say that he exercised at any time a judicial function, or that any determination becomes an adjudication which is binding upon him or upon anybody else. The question not being judicial in its nature, the fact that one Attorney General determined that he was not justified in commencing an action is no bar to the same Attorney General, or to his successor, in subsequently determining that the facts as then presented to him require him to institute the action.

None of the cases cited by the learned counsel for the defendant have any application, as they all relate to proceedings of boards or public officers who are charged by law with the determination of questions to be submitted to them, and where their determination is judicial in character, and not an act resting purely in discretion, and upon which it is made the duty of the public officer to exercise his discretion from time to time as the circumstances require.

For these reasons, I think the order below was right, and should be affirmed, with \$10 costs and disbursements. It is only proper that we should add that we think this is a question which should be determined by the Court of Appeals, and that, on application by the defendant, the question will be certified to that court. All concur.

Matter of Ablowich.

MATTER OF JULIUS ABLOWICH.

SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT, APRIL, 1907.

Executors and administrators—Firm indebtedness—Liability to estate.

A member of a firm appointed administrator of an estate to which his firm is indebted, is chargeable with the amount of such indebtedness, and the notes and checks representing the debt will be treated as so much money in his hands for the usual purposes of administration.

Executors and administrators—Revocation of letters—Effect on liability.

A member of a firm appointed administrator of an estate to which his firm is indebted is not released from liability for such indebtedness because his letters are revoked before the estate is administered and the firm obligation turned over to his successor.

(Decided April, 1907.)

Appeal from a decree of the Surrogate's Court of New York County settling an administrator's accounts. Reversed.

Mr. S. Livingston Samuels, for appellant.

Mr. Arthur Furber, for respondent.

PATTERSON, P. J.—I concur in the view, expressed by Mr. Justice INGRAHAM:

"That when the accounting administrator in this proceeding accepted the letters of administration issued to him, he was chargeable with the amount of that indebtedness represented by the notes and checks of the firm of which he

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was a member, as so much money in his hands for the usual purposes of administration."

I do not, however, concur in the view that when the letters of Julius Ablowich were revoked before the estate was administered, and he turned the notes and obligations of his firm over to his successor as administrator, and those evidences of debt were accepted by such successor, that thereby Julius Ablowich ceased to be chargeable with the amount of the indebtedness of his firm to the estate. If by reason of his appointment as administrator he became chargeable with the amount of the various obligations of his firm, that was a situation in which he was placed by the law. He could not discharge himself from it by turning over the evidences of his own indebtedness to his successor; nor could his successor discharge him by the acceptance of such evidence of indebtedness. If, by his becoming administrator, the debt of Julius Ablowich to the estate is to be regarded as assets in his hands, he must be charged with such assets in his account, and can only be discharged in the manner provided by law. It seems to me that this is not a case in which the doctrine of the election of inconsistent remedies by the present administrator applies.

I think the decree of the surrogate, confirming the report of the referee, overruling the objections to the account of Julius Ablowich, should be reversed, with costs, and the proceeding remitted for further action.

HOUGHTON and SCOTT, JJ., concur.

INGRAHAM, J. (dissenting).—It appeared that one Harris Ablowich died in the city of New York intestate, and on July 5, 1895, the respondent, Julius Ablowich was appointed administrator of his estate. Subsequently, and in September, 1895, the letters issued to Julius Ablowich were revoked, and the Farmers' Loan & Trust Company was appointed temporary administrator, to whom Julius Ablowich

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turned over all the assets of the estate which had come into his hands. Subsequently the appellant, Blumenstiel, and another were appointed administrators, and they received the assets of the estate from the Farmers' Loan & Trust Company. Julius Ablowich accounted, pursuant to a decree of the surrogate, on June 5, 1901. Objections to these accounts were filed by certain of the next of kin and by the substituted administrator, and the accounts and objections were sent to a referee. Subsequently the referee reported, overruling the objections both of the next of kin and of the administrator, which report was confirmed by the surrogate; and from the final decree, setting the account of the original administrator, Emanuel Blumenstiel, as administrator, appeals.

The original administrator, Julius Ablowich, was a member of a firm which consisted of himself and two sons. Among the assets of the estate of Harris Ablowich which came into the hands of the administrator were found various promissory notes and checks of this firm, amounting to a large sum, but which were disputed by the firm; it being claimed that these notes were accommodation paper. After the letters of administration were revoked Julius Ablowich turned over these notes and checks, with the other assets of the estate, to the temporary administrator, and subsequently the substituted administrator commenced an action against the members of the firm on these notes and recovered judgment against them for the amount due. The firm of Julius Ablowich & Co. subsequently became insolvent and were adjudicated bankrupts. This copartnership was insolvent at the time of the death of the intestate, and, although they continued in business for some months thereafter, they never had assets sufficient to pay the indebtedness of the firm. In the account filed the administrator charges himself with \$7,057.03, being cash received and notes and other obligations collected, which it is conceded were turned over to the temporary administrator. There was also annexed to

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the account a "Schedule B," which contained a statement of the property, other than money received by the accounting administrator, which had been turned over by him to the Farmers' Loan & Trust Company, the temporary administrator. Included in this were the notes and checks of the firm of which the accounting administrator was a member, aggregating more than \$40,000. By the objections the substituted administrator sought to charge the accounting administrator with the amount of these various checks and notes of the firm as money in his hands for which he was bound to account. The referee found that the accounting administrator was not chargeable with the amount of these notes as money in his hands, and he was discharged from liability on the accounting, having turned over all the notes and other obligations to the temporary administrator.

The only question presented on this appeal is whether the surrogate should have charged the accounting administrator with the amount of these notes and checks as money in his hands. The intestate died on June 14, 1895, and the firm of which the accounting administrator was a member continued in business up to October, 1895, when it failed. The order revoking the letters of administration was made on the 26th day of September, 1895, before the failure of the firm. The question must, I think, depend upon the rule of the common law, and not upon the provisions of section 2714 of the Code of Civil Procedure. That provision relates solely to executors, and was designed to change the rule of the common law that the appointment by a creditor of his debtor as his executor extinguished the debt except as to creditors, so that the executor was not bound to account for the same as assets, and to introduce a new system in reference to such an indebtedness. It was the obvious purpose of the statute, not only to save the executor's debt from extinguishment, but, in order to obviate all difficulty, doubt, and embarrassment, to cause it to be regarded as money in his hands. *Baucus v. Stover*, 89 N. Y. 1. The question was not before

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the court in *Keegan v. Smith*, 60 App. Div. 168, 70 N. Y. Supp. 260, as in that case the surrogate had charged the administrator on his accounting with an indebtedness that he owed to the intestate, and the action was based upon the decree of the surrogate against the administrator's surety. The propriety of the charge in the decree was not before the court, and although there was some expression in the opinion which would seem to indicate that this provision of the Code applies to administrators, as well as to executors, what was said was merely to indicate that since this provision of the Code the rule in regard to executors had been assimilated to that of administrators. But there was nothing in this provision of the Revised Statutes, which was subsequently inserted in section 2714 of the Code of Civil Procedure, that changed the rule in relation to the obligation of an administrator to account for money that he owed to the intestate at the time of the intestate's death. At common law it was the rule, as stated in *Am. & Eng. Enc. of Law* (2d Ed.), vol. 11, p. 787:

"If a debtor of the testator was appointed executor, the debt was extinguished; but a grant of administration to the debtor of the decedent merely suspended the remedy of the estate for a time against the debtor, and did not extinguish the debt. But the rule in equity is that a debt due from an executor or administrator is considered as having been paid to himself, and therefore he is accountable for the amount of his debt as assets in his hands."

And in the same volume (page 834):

"In the United States the equitable rule has been generally adopted by the courts, or expressly enacted by statute, and a debt due by an executor or administrator becomes, immediately on his appointment, assets in his hands. But the rule first stated is merely one of convenience, and will not be allowed to work prejudice to those beneficially interested, nor does it apply where the executor or administrator treats the debt as a subsisting obligation."

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And in the same volume, at page 1203, it is said:

"The modern doctrine as to the effect of appointing a debtor of the decedent executor of his will or administrator of his estate is that payment of the debt is presumed to have been made, and the executor or administrator is chargeable in his account with the amount of the debt as cash in hand. This seems to be the invariable rule if he was solvent at any time during his term of office, and in some jurisdictions it is the rule without regard to any question of his solvency or insolvency."

In *Marvin v. Stone*, 2 Cow. 781, the question as to the effect of the appointment by a creditor of his debtor an executor was discussed, and the rule stated that the appointment operates as a release or extinguishment of the debt, or the action for it, upon the ground that such must have been the intention of the testator, because, by making the debtor an executor he voluntarily destroys the only remedy or means by which the debt can be collected. The rule is universal that, when the remedy is suspended by the act of the party entitled to it, it is destroyed forever. Attention was then called to the qualification, as universal as the rule itself, that it did not apply where the testator does not leave funds sufficient for the payment of his debts; that in such case the debt due from the executor shall be considered assets in his hands for the payment of the debts of the testator, and by considering it assets the difficulty is avoided as to the means of enforcing payment.

The reasons for the rule given in this case, while applicable to executors, do not apply to administrators, as the appointment was one by the law, and not by the intestate. As to administrators the rule is that, where a debtor of an intestate takes upon himself the administration of the estate, he will be at once charged with the amount of his indebtedness to the estate, and bound to account for such indebtedness, both as to creditors and the next of kin. But the mere fact of appointment as administrator does not of itself de-

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stroy the obligation, and the rule of law charging the executor or administrator with the amount of debts as assets in his hands is merely adopted as a method of collecting the indebtedness, as, if the rule were not adopted, it being impossible for the administrator to sue himself, there would be no method of collecting the debt. It has also been held that under the provisions of the Revised Statutes which have been re-enacted as a part of section 2714 of the Code of Civil Procedure, where the member of the firm who was appointed executor owed a debt to the testator, as the executor could not sue the firm of which he was a member, the debt should be treated as so much money in his hands for administration; and there is no reason why this rule should not apply to an administrator.

It would seem to follow, therefore, that, when this accounting administrator accepted the letters of administration issued to him, he was chargeable with the amount of this indebtedness, represented by the notes and checks of the firm of which he was a member, as so much money in his hands for the usual purposes of administration. The debt not being extinguished, the remedy being suspended, when his letters were revoked before the estate was administered, and he was required to turn over to the temporary administrator the assets of the estate in his hands, the question was presented as to whether the estate would reserve the claim upon the notes, receiving them as a part of the estate, or insist upon a claim against the accounting administrator as so much money in his hands for which he was accountable. It might well be that the firm obligations would be much more valuable to the estate than a claim against the administrator as a debtor of the estate. The fact that the administrator or executor could be charged with the amount of his indebtedness to the estate does not of itself discharge the obligation of the debtor to the estate, or affect any lien that the intestate or testator held to enforce the obligation. That was expressly held in *Severhill v. Suydam*, 59 N. Y.

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140. The indebtedness not being discharged until actual distribution, where the letters of an administrator were revoked, the question whether he should be chargeable with the amount of this indebtedness of the firm of which he was a member, and the estate should look to him on an accounting, or whether the obligation should be transmitted by him to his successor as a part of the estate and accepted by the succeeding administrator as such, was a question which had to be determined by the substituted administrator. The accounting administrator, acting under the decree of the surrogate, actually delivered to the temporary administrator these notes and checks as property of the estate, and they were accepted as a compliance with the decree of the surrogate revoking the letters. When letters of administration were issued, these checks and notes were turned over to the administrator. He accepted them from the temporary administrator, and commenced an action against the copartnership, including the accounting administrator, and recovered a judgment upon the notes and checks. This was an election to treat the accounting administrator as a debtor of the estate upon the notes themselves, the estate retaining this claim against the other members of the firm, which was entirely inconsistent with a right of the estate to treat the notes as paid and the amount represented by them as money in his hands belonging to the estate. Where a party has inconsistent remedies, an election of one, especially where it is prosecuted to judgment, is a bar to the other. *Fowler v. Bowery Savings Bank*, 113 N. Y. 450; *Terry v. Munger*, 121 N. Y. 161; *Droege v. Ahrens*, 163 N. Y. 466.

There is a distinction between a case where an executor or administrator administers the estate and distributes it among the creditors, or next of kin, or legatees, and a case where letters of administration have been issued, but are revoked before the estate is distributed. When the letters are revoked, the estate is protected by retaining the liability of the administrator in favor of his successor. The duty had not

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devolved, and never did devolve, upon him to administer the estate and distribute its assets among the creditors and next of kin. He accounted to his successor, the temporary administrator, by delivering all of the assets of the estate which had come into his hands, including all the obligations of the firm of which he was a member, and such assets were accepted from the accounting administrator as a part of the estate. The estate could not then enforce these obligations, both against the administrator and the other members of the firm as debtors of the estate, and at the same time insist that the obligations had been paid and that the amount was in the hands of the accounting administrator for distribution; and an election to proceed against the firm upon the notes on behalf of the estate was, I think, an election of remedies, within the authorities above cited.

For this reason, I think the learned surrogate correctly held that the administrator had accounted for all the property that he had received as administrator, and passed his accounts; and the decree must therefore be affirmed, with costs.

McLAUGHLIN, J., concurs.

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**WILLIAM W. NICHOLS ET AL., APPELLANTS, v. JOHN
B. RILEY ET AL., RESPONDENTS.**

**SUPREME COURT, APPELLATE DIVISION, THIRD DEPART-
MENT, MARCH, 1907.**

§ 501.

Appeal—Complaint—Sufficiency.

A defendant who fails to ask that the complaint be made more definite and certain, cannot complain on appeal that no cause of action is stated, if, under the pleadings as they stand, any contract or any agreement can be proven which is fairly within the general allegations made.

Appeal—Demurrer to answer—Review.

In reviewing a decision on a demurrer to an answer in which the defendant has procured a holding that the complaint does not state facts sufficient to constitute a cause of action, the Appellate Division is to consider the decision as though it were upon a demurrer to the complaint, and for this purpose the court cannot assume as true any of the facts stated in the answer.

Attorney and client—Purchase of client's property—Trust.

An attorney who advised his clients that a purchase of certain life insurance policies belonging to them and which they had deposited as collateral security, was the only way in which they could obtain substantial benefit from the policies, cannot secretly purchase them for himself, and in case he does so, such purchase inures to the benefit of the clients, where he had previously agreed to purchase the policies for his clients, but failed to do so.

Pleading—Counter-claim—Facts not stating.

In an action by plaintiffs against their former attorney for a decree that the latter held as trustee certain life insurance policies which he agreed to purchase for them, since, as he claimed, that was the only way in which they could obtain substantial benefit from

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the policies, but which he subsequently secretly purchased for himself, an answer admitting the purchase, and alleging as a part of the transaction, defendant's purchase of two deficiency judgments owned by the trust company from which he purchased the policies, one against each plaintiff. which judgment defendant set up as a defense, does not set up a counter-claim within Code Civil Procedure, section 501, which requires that a counter-claim tend in some manner to diminish the plaintiff's recovery.

(*Decided March, 1907.*)

Appeal by plaintiffs from an interlocutory judgment of the Supreme Court overruling plaintiffs' demurrer to defendant's counter-claims. Reversed.

These plaintiffs, prior to December 10th, 1903, were the owners of four policies of life insurance issued by the Mutual Life Insurance Company of New York upon the life of William W. Nichols, their father, aggregating \$12,500. They were also the owners of another policy of life insurance issued by the Union Mutual Life Insurance Company of Maine upon the life of their father for the sum of \$5,000. These policies were held by the St. Paul Trust Company, a corporation carrying on business in St. Paul, Minn. The St. Paul Trust Company had been prior to this time the guardian of these plaintiffs, and these policies were held as security for the moneys which they had advanced to the plaintiffs as guardian. Upon the 10th day of December, 1903, these policies were sold by the said St. Paul Trust Company at a public sale, upon which sale they were purchased by the trust company itself. Thereafter the trust company went into the hands of a receiver, and upon the 20th day of April, 1905, the said receiver sold the aforesaid policies to the defendant John B. Riley, of Plattsburgh. William W. Nichols, the father, died on the 29th day of July, 1905. The insurance companies stand ready to pay over the money due upon the policies. The defendant Turner claims the moneys as assignee from John B. Riley. The plaintiffs have brought this action asking for a decree

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of the court that John B. Riley and the defendant Turner hold these policies as their trustee, and ask to be allowed to be subrogated to whatever rights they have therein upon payment of the sum that John B. Riley paid therefor. The complaint alleges that John B. Riley had, prior to this December 10th, been the counsel and legal adviser of the father of the plaintiffs, and that prior to that time, "and since then, has acted and represented them (plaintiffs) as their attorney and counselor at law in various legal proceedings and actions, and given them advice as such, and had otherwise acted as their agent and representative in various business transactions." It is further alleged that by reason of this relationship John B. Riley became possessed of knowledge of all the facts in reference to these policies and the sum for which they were held as security; that prior to this 10th day of December these plaintiffs had negotiations with certain persons in Chicago for the sale of their interests in the said policies, and that various offers had been made to them by the said persons for the purchase of their interests, "whereby certain great advantages would have inured to these plaintiffs"; that prior to the 10th day of December, 1903, the defendant Riley had represented to William W. Nichols, one of these plaintiffs, that he would purchase said policies, and that when purchased the interest of the plaintiffs would be protected by said Riley, "and stated in effect that these plaintiffs would realize nothing or receive nothing from said policies unless said policies were purchased by said Riley, and that said Riley would look out for and protect the interests of these plaintiffs in the said policies, and that said purchase would be for and on account of these plaintiffs and to their benefit and advantage, and requested the plaintiffs herein to execute and deliver to him assignments of their interests in and to said policies, stating that he could not effect such purchase of said policies unless he had such assignments"; that for the purpose stated, the plaintiffs did deliver to said Riley assignments of their in-

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terests in said policies, which assignments the said Riley has ever since retained, and which assignments he now has. It is further alleged that in reliance upon the representations and statements of said Riley the plaintiffs neglected to take any steps to obtain purchasers for said policies; that the said Riley did not bid or purchase the said policies upon the sale upon December 10th, but that secretly, upon the 20th day of April, 1905, he purchased the policies of the receiver of the said trust company, and that he thereafter assigned them to defendant Turner, who took with full knowledge of the plaintiffs' rights, and that due tender had been made both to said Riley and said Turner of the amount paid by Riley upon the purchase of said policies, and the request for their assignment, which had been refused.

The complaint purports to set forth a second cause of action, which states substantially the facts above stated, without the allegations as to the confidential relationship between the defendant Riley and the plaintiffs, but alleges that the promises made by said Riley to purchase said policies were fraudulently made without an intent to purchase the same. The prayer for relief is substantially for an equitable judgment declaring that these policies are held by said Turner in trust for plaintiffs, and that the plaintiffs are entitled to the proceeds thereof after payment of the amount paid by said Riley therefor. The answer of Riley, after making various denials and admissions, purports to set up two counter-claims. He in the first place denies that he had agreed to purchase the policies, as alleged in the complaint, or that he was owing any duty whatever to the plaintiffs to make the purchases for them. He admits that he purchased the policies upon the 20th day of April, 1905, of the receiver of the St. Paul Trust Company, and further alleges that at that time and as a part of said transaction he purchased two deficiency judgments held by the St. Paul Trust Company, one against each one of these plaintiffs. These judgments in each case amounted to upwards of \$5,000. These judg-

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ments he seeks to counter-claim against the plaintiffs severally. To these two counter-claims the plaintiffs demurred upon the ground that they did not state facts sufficient to constitute a cause of action, and that they are not of the character specified in section 501 of the Code of Civil Procedure. The court at Special Term did not pass upon the demurrer to the defendant's counter-claims, but upon defendant's attack held that the complaint did not state facts sufficient to constitute a cause of action. The demurrers to the counter-claims were therefore overruled and the complaint was dismissed, with leave to amend upon payment of costs. From the interlocutory judgment entered upon this decision the plaintiffs have appealed to this court.

Messrs. Wallach & Cook (Charles K. Allen and Garrard Glenn, of counsel), for appellants.

Messrs. Weeds, Conway & Cotter (Frank E. Smith and Thomas F. Conway, of counsel), for respondents.

SMITH, P. J.—The defendant might well have asked for a more specific statement of the alleged agreement on the part of Riley, the attorney, as to who should advance the money, as to how much he should advance, and as to the conditions upon which such purchase was to be made. Having failed to ask that the complaint be made more definite and certain, he cannot now complain that no cause of action is stated, if, under the pleadings as they stand, any contract or any agreement could be proven which is fairly within the general allegations made.

While this is a demurrer to the answer, because that demurrer searches the record, the defendant has procured a holding that the complaint does not state facts sufficient to constitute a cause of action. In reviewing this question, however, we are to review it as though the decision were made upon demurrer to the complaint, and for this purpose

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cannot assume as true any of the facts stated in the defendant's answer. It may fairly be inferred that Riley's assurance to the plaintiffs that he would purchase these policies and hold them for their benefit referred to the sale upon December 10th, 1903. He had advised the plaintiffs that that was the only way in which they could obtain substantial benefit from the policies, and had assumed to undertake to perform this office for them. In violation of his assurance he allowed their title to become divested by the sale, and afterwards, by secret agreement, purchased the property himself. Upon proof of these facts we are of the opinion that equity should impress a trust upon the policies in the hands of Riley, or his assignees, with knowledge as to the surplus of the fund over and above the amount paid therefor.

The defendant's contention is that after the sale of December 10th, 1905, the plaintiffs' title was completely divested, that Riley's relation of trust or agency terminated, and Riley might thereafter deal with the property the same as though he had been a stranger. In my judgment it is not very material whether the agreement of Riley related to a purchase at the sale upon December 10th, or whether it was an assurance of a purchase at any time that they could be obtained. In either case I think that the subsequent purchase of Riley inured to the benefit of the plaintiffs. In *Downard v. Hadley*, 116 Ind. 131, the head-note in part reads:

"An attorney, who is employed to perfect or defend a particular title to land, cannot, either during the continuance of the employment or after its termination, without disclosing the facts to and obtaining the consent of his client, avail himself of information acquired, or which it was his duty to acquire, while in that relation, and purchase an outstanding title for himself, and set it up in hostility to that which he was employed to perfect or defend; on the contrary, a title so acquired inures to the benefit of the client or his vendee."

In the opinion of the court it is said:

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“The obligation of fidelity which the attorney owes to his client is a continuing one, so far as respects any matter which has once been professionally committed to the attorney’s confidence; and, when the matter involved is the title to land, good faith and public policy require that any existing adverse title which the latter may thereafter purchase shall be deemed to inure to the benefit of his client, or his, the client’s, vendee.

The case at bar is not the case of property dealt with by a trustee after the title had been lost to the *cestui qui* trust without fault of the trustee. Under the allegations of the complaint the divestment of title by the sale of December 10th was through the neglect or refusal of Riley to purchase said policies for the plaintiffs’ benefit, as he had agreed to do. If upon the day after the sale Riley had purchased this property from the trust company, which itself became the purchaser upon the sale, it would hardly be questioned that he would hold such title for the benefit of the plaintiffs. Having failed to perform his agreement upon December 10th, 1903, he may be deemed to be owing a continuous duty to purchase those policies for the benefit of the plaintiffs in fulfillment of the assurance which he had given them. And when, a year and four months thereafter, he procured those policies, equity should declare that the purchase was made in pursuance of that duty which he owed to them which had for so long remained unfulfilled.

I am not at all sure that to reach this conclusion it is necessary to find a breach of duty on the part of the defendant Riley in failing to purchase at this sale on December 10th. Assuming for the argument that there were conditions to such purchase by reason of which he was absolved from making the purchase, could he, without his client’s consent, have made a private purchase next day and obtained title to himself? The fidelity which an attorney owes to his client is to use every endeavor in his power to the advantage of his client. By failing to insist upon conditions, even

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without collusion, opportunity may be presented for a subsequent purchase by him to his private gain. Collusion itself is difficult to prove. It may well be held that to insure the utmost fidelity of an attorney he should be barred from ever after, without his client's consent, making private gain out of a sale which he was once employed to prevent. The rule may well be dictated by public policy, and is in accord with the jealous care the courts have taken to guard sacredly the relations of attorney and client. In *ex parte James*, 8 Ves. 337, 352, application was made to restrain the solicitor of an assignee in bankruptcy from bidding at a bankrupt sale. The motion was granted. Lord Eldon, in writing in respect thereof, said :

“With respect to the question now put, whether I will permit Jones to give up the office of solicitor and to bid, I cannot give that permission. If the principle is right, that the solicitor cannot buy, it would lead to all the mischief of acting up to the point of the sale, getting all the information that may be useful to him, then discharging himself from the character of solicitor and buying the property. Infinite mischief would be the consequence in a number of cases. On the other hand, I do not deny that those interested in the question may give the permission. The rule is that a trustee shall not become the purchaser until he enters into a fair contract, that he may become the purchaser with those interested. * * * No court can say, *ab ante*, they will permit this.

In *Carter v. Palmer*, 8 Clark & F. 657, a barrister had for several years been the general counsel of the plaintiff under a general retainer, and had by reason of that relation acquired an intimate knowledge of his affairs. After the relations were ended he purchased some securities which were held by the plaintiff. The House of Lords held the barrister to be trustee for the plaintiff of the securities thus purchased. Lord Cottenham, in writing for the court, said :

“From the earliest times down to the latest case in which

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I believe the subject has been discussed, which is *Taylor v. Salmon* (4 Myl. and C. 139), the rule in equity has been always recognized which would prevent a person in the situation of the appellant making such a purchase for his own benefit whilst he continued to act as agent. As the reason for this disability continues to operate after the employment has ceased, the disability itself must continue unless a contrary rule has been established by decisions. But this is not the case, but the very reverse."

See, also, *Peck v. Peck*, 110 N. Y. 64, 72; *Case v. Carroll*, 35 N. Y. 385.

If, then, the complaint is held to state a good cause of action, we must decide what the Special Term has failed to decide, to wit, the issue raised by the plaintiffs' demurrer to the defendant's counter-claims. To these the plaintiff has demurred on the ground that they do not state facts sufficient to constitute a cause of action, and also upon the ground that they are not of the character specified in section 501 of the Code. It cannot be held that they do not state facts sufficient to constitute a cause of action. By section 501 of the Code, however, a counter-claim must tend in some way to diminish or defeat the plaintiff's recovery. I am unable to see how these counter-claims in any way can tend to diminish or defeat the plaintiffs' recovery in this action. I cannot agree with the appellant's counsel that the complaint states a legal cause of action for deceit. It was evidently not the intention of the pleader when the complaint was drawn, nor can such a cause of action be spelled therefrom. There are no appropriate allegations as to damage suffered in order to sustain such a cause of action. If this plaintiff succeeds in holding the defendant Riley as trustee of these policies, it is clear that the defendant would have no right of action upon these deficiency judgments. They would be deemed to be held in like trust with the policies. If they do not succeed in establishing this trust, they must fail in their action, and the establishing of these

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counter-claims by the defendants will neither defeat nor diminish any judgment which they might obtain. If we are right in this view of the pleadings, it is unnecessary to determine whether the claims of the plaintiffs are so far several as to admit of several counter-claims.

The interlocutory judgment should, therefore, be reversed, and the plaintiffs' demurrer sustained, with leave to the defendant to amend his answer upon payment of costs of the demurrer and of this appeal. All concur.

ALBURTHA BURGHEN ET AL., PLAINTIFFS, v. ERIE
RAILROAD CO. ET AL., DEFENDANTS.

SUPREME COURT, SPECIAL TERM, ERIE COUNTY, FEB-
RUARY, 1907.

§§ 545, 546, 488 ET SEQ.

Nuisance—Abatement—Action by several.

Various lot owners affected by an alleged nuisance may all join in one action for its abatement.

Damages—Nuisance—Several Plaintiffs—One action.

The money damages sustained by each of several lot owners by the commission of a nuisance caused by the interference with the natural flow of a stream, cannot be determined and awarded in an action brought by such owners, while the right to abate the nuisance is a common one, yet the damages of each one are separate and distinct.

Pleading—Demurrer—Irrelevant matter.

A complaint in an action by several lot owners for the abatement of a common nuisance, alleging that each parcel of land owned by the various plaintiffs was damaged in various amounts, is not

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demurrable as stating separate and distinct causes of action, but these allegations at most are irrelevant and redundant, and the remedy would be to strike them out, under Code Civil Procedure, sections 545 and 546.

Pleading—Demurrer—Granting relief warranted by facts.

A complaint in an action by various lot owners for the abatement of a common nuisance and demanding damages, is not demurrable under Code Civil Procedure, sections 488 et seq., because the plaintiffs demand separate money judgments, since the prayer for relief, however broad, does not make a complaint demurrable, and the court may render such relief, and no more, as is warranted by the facts proven.

(Decided February, 1907.)

Demurrer to complaint by several plaintiffs in action for abatement of nuisance and demanding damages. Overruled.

Mr. Wallace Thayer, for plaintiffs.

Mr. Adelbert Moot, for defendant.

WHEELER, J.—This is a demurrer by the Erie Railroad Company to the plaintiffs' complaint. The complaint alleges that the plaintiffs are the owners of various parcels or lots of real estate abutting on or adjacent to what is known as "Smokes Creek," each of the plaintiffs being the owner of a separate lot or parcel which is described and designated in the complaint. The complaint then alleges that, since the plaintiffs purchased and became the owners of several properties, the defendant railroad companies have each erected bridges over and across the creek in question, and have so constructed the abutments thereto that the natural flow of the stream has been impeded, and its waters dammed back, thus flooding the lands of the plaintiffs and damaging the same. The complaint continues, and alleges that:

"The amount of damages which each plaintiff has suffered by reason of the overflow of his said lot as above stated in

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the years 1902, 1903, 1904 and 1905 is placed opposite the name of said plaintiff and the number of his said lot, respectively."

And then follows a tabulated list of the different plaintiffs, some 84 in all, the number of the lot owned by each, and the amount of alleged damage to each lot.

The prayer of the complaint asks the abatement of the alleged nuisance, "and that each of said defendants be required to pay to each of said plaintiffs as the same may be apportioned and established on this trial, each of said plaintiff's damages as established and proven, and that the plaintiffs have the costs of this action," etc.

The defendant the Erie Railroad demurs on several alleged grounds, but that particularly urged and argued is that an alleged cause of action for damages in favor of the plaintiff Alburtha M. Burghen has been improperly united with an alleged cause of action for damages in favor of each of her co-plaintiffs; it being contended that a recovery by way of damages in favor of each plaintiff cannot be had. It is conceded by counsel for the demurring defendant that it is not improper for various lot owners affected by the alleged nuisance to join in an action to abate it, and this is well established by a number of well-considered cases. *Strobel v. Kerr Salt Co.*, 164 N. Y. 323, citing *Emery v. Erskin*, 66 Barb. 9-14; *Reid v. Gifford*, *Hopk. Ch.* 416, 477; *Murray v. Hay*, 1 Barb. Ch. 59, 621; *Blunt v. Hay*, 4 Sandf. Ch. 362; *Brady v. Weeks*, 3 Barb. 157. In the *Strobel Case* it is said that:

"While each owns a distinct piece of land situated upon a part of the stream separate from that abutted by the land of every other owner, they have a common grievance against the defendant for an injury of the same kind, inflicted at the same time, and by the same acts. The common injury, although differing in degree as to each owner, makes a common interest and warrants a common remedy."

So, too, it is held that the different defendants were prop-

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erly joined as defendants in the action, as the allegation is that each has contributed toward the creation of the alleged nuisance. *Warren v. Parkhurst*, 186 N. Y. 45; *Meyer v. Phillips*, 97 N. Y. 485. See, also, *N. Y. C. & H. RR. Co. v. Schuyler*, 17 N. Y. 592. We are not aware, however, that the courts have gone to the extent of holding that in an action brought by a number situated as these plaintiffs are they can in the same action have their separate money damages determined and awarded. It cannot be said as to the damages suffered by each that the plaintiffs have a common grievance. On the contrary, while the right to abate the nuisance is a common one, the damages of each are separate and distinct, and is a question in which the other co-plaintiffs have no interest, and cannot be heard on the trial. Therefore claims for such damages ought not to be litigated or disposed of in an action of this character, and this seems to be the law as established by the decisions of the courts. In *Brady and Others v. Weeks*, 1 Barb. 157, an action was brought by various owners of neighboring property to abate a nuisance caused by the maintenance of a slaughter house, and the court held it was proper to unite the owners as parties plaintiff by reason of their common interest, but the court at the same time also held that the bill was rendered multifarious by inserting therein, in addition to the prayer to restrain, a prayer that the defendants be decreed to pay the plaintiffs, respectively, the damages they had sustained by the nuisance. See, also, *Murray v. Hay*, 1 Barb. Ch. 65; *Peck v. Elder*, 3 Sand. 126; *Davidson v. Isham*, 9 N. J. Eq. 186; *Demarest v. Hardham*, 34 N. J. Eq. 469; *Rowbotham v. Jones*, 47 N. J. Eq. 337. I therefore conclude that in this action the various plaintiffs cannot recover their separate damages, but their relief is confined to the abatement of the alleged nuisance in which all have a common interest.

Assuming, therefore, that there can be no recovery of the individual damages alleged to have been sustained by the

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different plaintiffs, is the complaint for that reason demurrable? I think not. The allegations of the complaint that each parcel of land owned by the various plaintiffs was damaged in various amounts does not in my judgment necessarily amount to an allegation of a separate and distinct cause of action. These allegations may perhaps be deemed proper as showing that all the plaintiffs have a common interest in the abatement of the nuisance complained of and a right to a decree to that effect. At the most, these additional allegations are irrelevant or redundant, and the remedy of the demurring defendant would be to strike them out under sections 545 and 546 of the Code of Civil Procedure.

Nor does the fact that the plaintiffs demand separate money judgment change the case. The prayer for relief, however broad, does not make a complaint demurrable. The court, notwithstanding the extent of the prayer, may render such relief, and no more, as the facts proven warrant.

The demurrer is therefore overruled, with permission to the demurring defendant to answer within 20 days after service of a copy of the judgment to be entered hereon, upon the payment of costs of this demurrer.

Washington Life Insurance Co. v. Scott.

WASHINGTON LIFE INSURANCE CO., PLAINTIFF,
v. BLAIR T. SCOTT, DEFENDANT.

SUPREME COURT, SPECIAL TERM, NEW YORK COUNTY,
FEBRUARY, 1907.

Pleading—Amended and supplemental answer.

A motion for leave to serve an "amended and supplemental answer" must be denied, since no such pleading is recognized by the Code of Civil Procedure; such relief must be made the subject of two separate, consecutive applications.

(Decided February, 1907.)

Motion to serve an amended and supplemental answer.
Denied.

Mr. Samuel B. Clarke, for plaintiff.

Messrs. Gardenhire & Jettmore, for defendant.

LEVENTRITT, J.—This is a motion for leave to serve an amended and supplemental answer. No such pleading as an "amended and supplemental pleading" is recognized by the Code. *Horowitz v. Goodman*, 112 App. Div. 13, 98 N. Y. Supp. 53; *Luckey v. Mockridge*, 112 App. Div. 199, 98 N. Y. Supp. 335. Even if I were disposed to allow the service of one or the other form of answer, that relief could not follow on this motion, because the proposed answer embraces both amendment and supplement. It is a condition precedent to the right to serve an amended or supplemental pleading that it should be annexed to the motion papers. *Luckey v. Mockridge*, *supra*. The proposed answer is neither one nor the other, but a combination of both. The ominous relief which the defendant seeks on this motion must be made the subject of two separate, consecutive applications.

Motion denied.

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PEOPLE EX REL. GEORGE W. PERKINS, RESPON-
DENT, v. JOSEPH F. MOSS ET AL., APPELLANTS.

NEW YORK COURT OF APPEALS, FEBRUARY, 1907.

§§ 2015, 2019.

Habeas Corpus—Release—Before examination.

One arrested under a warrant issued by a magistrate who was justified upon the facts before him in drawing an inference of the existence of probable cause to believe that the crime charged had been committed, is not obliged to await an examination, but is entitled, under Code Civil Procedure, sections 2015, 2019, at once to sue out a writ of habeas corpus.

Crimes—Larceny—Contributions to campaign funds.

An officer of a corporation, such as an insurance company, is not guilty of the charge of larceny, at least in absence of a statute prohibiting the contribution of corporate funds for campaign purposes, who without any benefit accruing to himself, and acting, as he supposed, in the interest of the corporation, at the request of its president, contributes personal funds for the benefit of the corporation, and afterwards accepts from the officers of the corporation reimbursement for the sum so contributed.

(Decided February, 1907.)

Appeal by respondents from an order of the Appellate Division, First Department, which reversed an order dismissing a writ of habeas corpus. Affirmed.

Upon a warrant issued by a city magistrate of the city of New York, charging him with the crime of grand larceny in the first degree, the relator was arrested by, and taken into the custody of, a police officer. Thereafter, upon a petition to the Supreme Court, setting forth his arrest and

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averring that the warrant was unlawfully issued and that the petitioner was illegally restrained by virtue thereof, writs of habeas corpus and of certiorari were issued directed to the defendants, the police officer and the city magistrate, and commanding the production of the relator and the certification of the cause of his imprisonment. Thereupon the relator was brought before a Special Term of the Supreme Court, and, upon the return made by the city magistrate to the writ of certiorari and after a hearing had, the writ of habeas corpus was dismissed and the relator was remanded into custody. Upon appeal to the Appellate Division, in the First Department, this order was reversed and the discharge of the relator was ordered. The people then appealed to this court.

The information upon which the warrant of arrest was issued charging the relator with the crime of grand larceny in the first degree was contained in certain depositions taken before the magistrate. One deposition was by Darwin P. Kingsley, a vice-president of the New York Insurance Company, which stated that in December, 1904, when he was secretary of the finance committee of that company, a meeting was had of all the members of the committee, including McCall, since deceased, who, as president of the company, was *ex officio* a member. It was stated by the president that, in behalf of the insurance company, he had promised to pay to Cornelius Bliss, as treasurer of the Republican National Committee, for use in the presidential campaign of that year, such sums as should not exceed \$50,000, and that Perkins, this relator, then a vice-president of the company, at his (the president's) request and to carry out the agreement with Bliss, had advanced to the latter large sums of money. McCall did not ask the committee to take any official action upon this statement, but desired to inform it of the facts. Conversation was had in regard to the matter and no official action was taken by the committee; but "it was the expressed opinion of those present that McCall should cause

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Perkins to be reimbursed, for the sums so advanced, out of the funds of the company." It was stated, also, in the deposition that McCall, "by virtue of his office, had power to make disbursements, known as 'disbursements upon executive order.'"

Another deposition was by Edmund D. Randolph, a trustee and the treasurer of the insurance company, who was present at the meeting of the finance committee referred to in the deposition of Kingsley, which corroborated Kingsley's statements as to what had taken place. Randolph stated that some time after the meeting in December, 1904, he drew a check to reimburse Perkins, the relator, for the moneys he had advanced to Bliss; that the payment was made by the treasurer's check to the order of J. P. Morgan & Co., a firm of which Perkins was a member; that this check was drawn by him pursuant to the direction of McCall, the president, that, "at that time, large powers were vested in McCall as president to order disbursements to be made from the funds of the company without first submitting for approval to any committee"; that that power had been exercised "upon his sole personal authority" for many years without having been challenged; and that Perkins had had nothing to do with the transaction of the drawing of the check, or of the book entries.

The deposition was taken of Thomas A. Buckner, a vice-president of the company, who identified a letter written by the relator to the district attorney the day before the issuance of the warrant of arrest. The relator's letter was written in response to the request of the district attorney for a statement of the former's connection with the contribution made by the insurance company to the Republican National Committee in 1904. From this letter it appears that Bliss, the treasurer of that committee, had informed the relator of the promise of McCall, the president of the company, that the company would contribute up to the sum of \$50,000 towards the campaign; that McCall, upon inquiry, corrob-

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orated Bliss' statement and explained that as demands had been made upon him for other political contributions by the company, which did not seem to him to be for its interest to make, "it would make it easier for him to refuse such demands, if the payment to the Republican Committee was not at that time made directly from the funds of the company"; that he asked relator to see Bliss and to make the payments personally, and that he (McCall) "would see that the matter was taken care of later on"; that accordingly, the relator advanced to Bliss, from his own resources, various sums amounting to \$48,500; that in December, 1904, upon the subject of his reimbursement coming up between himself and the president, it was concluded to take the matter up with the members of the finance committee, and later, at a meeting of the committee, after McCall had explained that, at his request, the relator had made the above advances and that provision should be made for reimbursement, "the conclusion was reached that the president should cause me to be reimbursed"; and that a check to the order of the relator's firm of J. P. Morgan & Co. was afterwards drawn and delivered by the treasurer of the company. The letter concludes with this clause: "It never occurred to me that there could be any question as to the propriety of such expenditure, which I believed to be for the benefit of the company. It has come to me as a total surprise that the legality of such payments should be questioned. While so asserting, it is not my intention to dispute or deny civil liability to account to the company for these moneys. * * * I derived no personal advantage of any kind from the transaction; and certainly I had no intent other than to serve the interests of the company." The district attorney was authorized to make any use of the statement in the letter, and the relator waived any privilege or immunity in connection with it.

Mr. Wallace MacFarlane, for appellants.

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Messrs. William N. Cohen and Lewis L. Delafield, for respondent.

GRAY, J. (after stating the facts).—If the information which was laid before the magistrate furnished no legal evidence of the commission of a crime by the relator, then he was illegally restrained of his liberty. If the facts shown did not warrant an inference by the magistrate of the existence of probable cause to believe that the crime charged had been committed, he was without jurisdiction to cause the arrest of the relator, and the latter was entitled to resort at once for his protection to the writ of habeas corpus. Section 2015 of the Code of Civil Procedure provides that “a person imprisoned or restrained in his liberty, within the state, for any cause, or upon any pretenae, is entitled, * * * to a writ of habeas corpus, or a writ of certiorari, as prescribed in this article, for the purpose of inquiring into the cause of the imprisonment or restraint, and, in a case prescribed by law, of delivering him therefrom.” The petitioner is only required to state, among other things, that he “is imprisoned, or restrained in his liberty; the place where, * * * and the officer or person by whom, he is so imprisoned or restrained.” Section 2019, Code Civ. Pro. The arrest of the relator was an actual restraint of his person, and he was not obliged to await an examination before the magistrate. The provision of the statute in that respect was for his benefit; in order that he might be informed of the charge and that he might have the opportunity to examine the witnesses and to make any statement in relation to the charge. See Code Cr. Pro., sections 188-197. He could waive these proceedings, however, and immediately sue out the writs that the legality of his detention under arrest might be inquired into. The statute, which confers the right to the writ of habeas corpus, has always been construed in favor of the liberty of the citizen. The protection afforded by it against arbitrary

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and illegal arrest is within the guaranties of our Constitution, and the statutes of the state have always been intended to increase the facilities for the issuance of this great and valuable common-law writ, and to insure the prompt hearing and disposition of the petitioner's case.

If the magistrate issued the warrant of arrest without sufficient evidence in the particular case, the process is a nullity. The question always must be whether the magistrate acquired jurisdiction to cause an arrest of the person, and the court, upon the habeas corpus proceeding, will look back of his warrant and see if the facts stated in the depositions of the prosecutor and his witnesses support his warrant. Code Cr. Pro., section 149; Church, Hab. Corp., section 236. If they did not furnish reasonable and just ground for a conclusion that the crime charged had been committed and that the defendant committed it, then jurisdiction was lacking to hold the prisoner in custody for any time. Code Cr. Pro., section 150.

The relator had the absolute right to question, in this way, the sufficiency of the facts laid before the magistrate to constitute the crime of larceny. That crime is defined in section 528 of the Penal Code, which reads, so far as material, as follows: "A person who, with the intent to deprive or defraud the true owner of his property, or of the use and benefit thereof, or to appropriate the same to the use of the taker, or of any other person, * * * having in his possession, custody, or control, as a bailee, servant, attorney, agent, clerk, trustee, or officer of any person, association or corporation, * * * any money, property, evidence of debt or contract, article of value of any nature, or thing in action or possession, appropriates the same to his own use, or that of any other person other than the true owner or person entitled to the benefit thereof, steals such property, and is guilty of larceny."

It is apparent that what constitutes the crime of taking the property of another for the use of the taker, or of that

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of any other person than the legal owner, is the intention with which the act is committed. Under the statute the crime of larceny no longer necessitates a trespass; but it does need, as an essential element, that the "intent to deprive or defraud" the owner of his property, or of its use, shall exist. The intent, by necessary implication, as from its place in the penal statute, must be felonious; that is to say, an intent without an honest claim of right. It is not now essential, as it was under the Roman and early English law, that the intention of the taker shall be to reap any advantage from the taking. The statute makes the crime to consist in the intent to despoil the owner of his property. That is necessary to complete the offence, and if a man, under the honest impression that he has a right to the property, takes it, it is not larceny, if there be a colorable title. See Pen. Code, section 548; People v. Grim, 3 N. Y. Cr. R. 317; Bishop's Crim. Law, sections 297, 851; Wharton's Crim. Law, sections 883, 884. The charge of stealing property is only substantiated by establishing the felonious intent. Without it there is no crime; for it would be a bare trespass. It is the criminal mind and purpose going with the act which distinguish the criminal trespass from a mere civil injury. 1 Hale's P. C. 509; McCourt v. People, 64 N. Y. 583. Doubtless, if the particular act was specified in the penal statute, an honest belief that it was right, while it would purge the act from immorality, would not relieve it from indictability. But, when there is no statute on the subject and the act is not one which concerns the state directly, because affecting the peace, order, comfort, or health of the community, then the wrong done is private in its character and must be redressed by private suit. The act of the president of the insurance company, which the relator may be regarded as abetting (section 29, Pen. Code), that is, the contribution of corporate funds for the purposes of a political campaign, was not *malum prohibitum*, or a prohibited wrong; for it was not until two years later that it was made a misdemeanor by the law

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of 1906. Laws 1906, p. 470, c. 239. The Legislature may make that criminal which was not so before; but we may not reason back of the enactment and predicate crime of an act which was lacking in criminal intent. It is of the very nature of crime that the criminal act shall involve the violation of a public law, or a wrong, which, because grossly immoral and vicious, affects the public injuriously. If we turn, then, to a consideration of the facts upon which the magistrate ordered the relator to be arrested, it is impossible, reasonably speaking, to find that criminal element which the statute makes a necessary one, the intent of the accused to steal.

When summed up, the evidence amounts to this: That the president of the company, in whom was vested, and who had for years been exercising, the power to make disbursements of the corporate funds upon his sole authority, had agreed that the insurance company would contribute to the presidential campaign fund of the Republican National Committee up to the amount of \$50,000, and that, to protect the company against other demands for political purposes, he requested the relator, one of the company's trustees, to personally carry out the agreement by advancing the moneys. The relator acquiesced in the president's request, advanced the money, and subsequently the president brought up the subject of his reimbursement, informally, before a full attendance of the members of the finance committee of the company. The president's purpose was not that the finance committee should take official action in the matter; but that the trustees should be informed of what he had done, and that he might have their opinions upon the matter. It was the general opinion that the president should cause the relator to be reimbursed for his advances out of the corporate funds. The facts stated by the witnesses showed that what was brought before this body of the company's trustees, was the claim, or right, of Mr. Perkins to be repaid the moneys which he had paid out by the procurement of the president, in order

that the latter's agreement on behalf of the company might be carried out, and that the president, exercising executive power, with which he appears to have been clothed, directed the treasurer of the company to draw the check for the amount of the relator's claim. Furthermore, the prosecution in making use before the magistrate of the relator's letter to the district attorney, as an admission of the facts of the transaction complained of, not only made the fact clear that the moneys were paid out to satisfy the relator's claim, but, also, caused it to appear affirmatively that the relator had acted in the honest belief that he was benefiting the company and had derived no personal advantage. The magistrate was not bound to accept the letter as establishing the innocence of the accused; but, as a part of the evidence used to make out the charge, he had his statements explaining the transaction and stating his honest motives. It was equivalent to his examination.

It is unquestionably true that the purpose for which the moneys of the company were promised was foreign to the chartered purposes of the corporation; but that fact does not make the payment a criminal act. The act not being *malum prohibitum*, nor *malum in se*, the innocent motive of indirectly promoting the corporate affairs, through the supposed advantage of the continuance in power of the Republican administration, purged the act of immorality and it lacked criminal intent. The company had not the right, under the law of its existence, to agree to make contributions for political campaigns, any more than to agree to do other things foreign to its charter; but it had capacity to make agreements, if not prohibited, or inherently wicked. Its act would affect the interests of those concerned with the conduct of the corporate business and effect a private wrong; but it would not be a public offense, or illegal, in the sense of violating any public interest. *Bissell v. M. S. & N. I. R. R. Co.*, 22 N. Y. 258; *Holmes v. Willard*, 125 N. Y. 75; *Moss v. Cohn*, 158 N. Y. 240. If making the agreement to contribute from

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the corporate funds was an illegal act, it was because of the limitations upon the corporate powers, and not because of considerations of the disadvantage to the company of the act. There are a great many things which those intrusted with the management of corporate properties are known to do and which they ought not to do, whatever their good motives, not because some statute forbids, but because they are not within the scope of the chartered powers. Their own sense of rectitude and of what is due to those who trust them should admonish them of the wrongful nature of their conduct. It has been well observed that the ultimate welfare of the citizen demands that he shall conform his conduct to the moral law, and it concerns him that every one else should conform to it. A moral obligation should be none the less authoritative in the conduct of life that it is binding only upon the conscience of the person as a duty and is imperfect in law from the absence of legal sanction. Courts, however, may not sit to judge the conduct of a defendant by any moral code or rules of ethics. Their sphere is to ascertain if the facts shown establish the crime charged against him. In the facts stated in these depositions I find none upon which criminality can be predicated. The essential element of the "intent to deprive and defraud" is nowhere to be found, and there is no just basis for the inference. There was no concealment about the transaction and knowledge of it was conveyed to the other trustees. That the relator may have made a mistake of law, which will not relieve him from liability in a civil action, may be true, and he expressly disclaimed in his letter any intention to dispute such a liability; but this was a case where the intent, or good faith, was in issue and then knowledge of the law is immaterial. *Knowles v. City of N. Y.*, 176 N. Y. 439; *Goodspeed v. Ithaca St. Ry. Co.*, 184 N. Y. 354. The relator came to the aid of the president of the company, who, as such, had agreed to contribute moneys to the campaign fund, and advanced the moneys, temporarily. Hav-

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ing done so, for no other reason than for the supposed advantage of the company, his claim to be reimbursed from the treasury of the company is openly presented and it is paid. But within the spirit, if not the letter, of section 548 of the Penal Code that was not larceny. The section provides that "upon an indictment for larceny it is a sufficient defense that the property was appropriated openly and avowedly, under a claim of title preferred in good faith, even though such claim is untenable." This section is an expression of the emphasis which the statute lays upon the intent with which the property of another is taken. It is a qualification of the provisions of section 528 of the Penal Code, defining what shall constitute the crime of larceny. It is of considerable significance, as illustrating the legislative understanding, that when, in 1906, the Legislature dealt with the question specifically, the offense was declared to be a misdemeanor, not a larceny.

The question in this case was whether the facts evidenced the commission of a crime and that was a question of law which went to the jurisdiction of the magistrate. They showed that the design to injure, the motive to despoil the company, the wrongful purpose, were all lacking in the information, which was laid before the magistrate and upon which the warrant issued. This being so, the act of the magistrate was wholly without jurisdiction, and the warrant and all proceedings under it were absolutely void. Hewitt v. Newburger, 141 N. Y. 538, 543.

For these reasons, I advise the affirmance of the order appealed from.

HISCOCK, J.—I concur with Judge GRAY in the affirmance of the order appealed from.

Stripped of any collateral and immaterial considerations, such as that of the consequences which may result to the magistrate issuing a warrant without any legal basis therefor, the naked question is whether any evidence was pre-

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sent to such magistrate which showed reasonable ground for believing that the defendant had committed the crime of larceny. Unquestionably, if there was no evidence justifying the inference of such guilt, the magistrate was without jurisdiction and the relator should be discharged.

This court seems to be wholly or practically unanimous in the opinion that the evidence presented to the magistrate would not be sufficient to sustain a conviction of the defendant for the alleged crime and that he should be discharged if convicted thereon. The nature of this case, the attention which it has received, and the facts and circumstances disclosed render not at all violent the presumption that the district attorney has now presented all of the evidence within his reach, and therefore it is quite probable that the really practical question involved is whether the relator shall be discharged at the present or at a subsequent stage of the proceedings. But, however this may be, it will be conceded, as is argued in behalf of the appellants, that if even a slight degree of evidence of the relator's guilt was produced—"something upon which the judicial mind was called upon to act in determining the question of probable cause"—the magistrate had jurisdiction, the warrant was valid, and the order appealed from should be reversed.

We are all agreed upon certain fundamental principles pertaining to this case. The contribution by the president of the New York Life Insurance Company from its funds of \$50,000 to a political campaign committee, even in the absence of any statutory prohibition, was absolutely beyond the purposes for which that corporation existed and was wholly unjustifiable and illegal. And, while the contribution was suggested and made by the authority and direction of the president of the company rather than by the relator, still the latter was so a party to the execution of the act that he must be regarded as having aided and abetted it, and therefore is criminally responsible if a crime was committed. Further than this, the assumption will be made without critical an-

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alysis of its correctness in all respects, that because the relator understood when he advanced his own funds to Mr. Bliss that the same would be repaid to him with moneys of the corporation he was from the beginning a party to the plan to appropriate such corporate funds to an unauthorized purpose, and that, therefore, when payment was made to him, he did not occupy the position of a bona fide, though mistaken, claimant, and does not come within those provisions of section 548 of the Penal Code, which provide that it is a defense to an indictment for larceny "that the property was appropriated openly and avowedly under a claim of title preferred in good faith, even though such claim is untenable."

But, confessedly, these facts and considerations alone are insufficient to justify the charge which has been laid against the relator. At the time of his arrest there was no statute making the contribution of corporate funds to political purposes of itself a crime, and therefore there must be some evidence that the relator in doing what he did was actuated by a felonious, criminal intent. It is agreed upon all sides that the crime of larceny may not be committed unintentionally, unconsciously, or by mistake, but that, in order to accomplish it, the perpetrator must have the intent referred to. It may be difficult at all times exactly and satisfactorily to define this intent, but the requirement for it as applicable to this case means that, when the relator took part in the appropriation of the moneys in question, he must have had in some degree that same conscious, unlawful, and wicked purpose to disregard and violate the property rights of another which the ordinary burglar has when he breaks into a house at night with the preconceived design of stealing the property of its inmates. There is, as there ought to be in the absence of statutory enactment, a long distance between the act which is unauthorized and illegal and which subjects the trespasser to civil liability, and the one which is legally wicked and criminal and which subjects the offender to imprisonment. It is on this point of criminal intent that I think the district

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attorney has failed to furnish any evidence whatever on which the magistrate might act, although the burden affirmatively rested upon him so to do.

At the outset, it must be borne in mind that some of the circumstances which surround this charge are merely accidental and superficial, and not at all decisive. The fact that this contribution was made by the officers of one of those corporations whose management recently has been subjected to grave criticism, and even that it was made for a purpose properly subjected to condemnation and now absolutely prohibited, are of no legal significance. However public opinion or ethics might distinguish them, the legal principles which control the consideration of this case are the same which would be applicable if the president of a manufacturing corporation had contributed from its funds toward the erection of a church supposed to be for the benefit of its employes, or the officers of a railroad company had contributed its funds or the use of its property and transportation facilities for the temporary relief of the sufferers from some sudden and great calamity. We probably should be compelled to say in each case that the contribution was beyond the purposes of the corporation and unauthorized and illegal, and the officers making the same civilly liable, but it certainly would be a matter of grave import to hold, in the absence of something else, that they might be prosecuted for stealing. It, therefore, seems to me that we are justified in scrutinizing with care the depositions presented to the magistrate for the purpose of ascertaining whether they do in fact disclose any intent to commit a crime.

Part of the evidence produced consisted of a written statement made by the relator at the request of the district attorney, and by the latter adopted deliberately and in its entirety as proof of the facts upon which a warrant should be issued. It affirmatively disproves the existence of any criminal intent upon the part of the relator. It recites the facts which led him to make advances from his personal

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funds in the first instance and which attended his repayment afterwards, and distinctly disclaims any purpose to violate the law or to act otherwise than for the benefit of the corporation. But it may be said that the magistrate was at full liberty to believe or reject this statement in whole or in part. It seems to me that this is too broad a statement of the law. Various authorities, like *Becker v. Koch*, 104 N. Y. 394, and *President, etc., Manhattan Co. v. Phillips*, 109 N. Y. 383, may be found holding that upon the examination of an adverse witness, the party calling him is not as a matter of law bound by explanations or adverse statements which he may make, but that he may ask the jury to disregard the same. But an examination of these cases will show that the jury were permitted to disregard such explanations or statements only because they were contradicted by other facts appearing or by inherent probabilities. Moreover, it is well recognized that especial consideration has been accorded to the exigencies liable to arise upon the examination of a hostile witness where the party compelled to call him cannot anticipate the form which his evidence will take. The natural rules by which to measure the force of relator's statement in this case are those which have been framed in respect to the use of statements and admissions made by a party outside of the trial. In such a case the party attempting to use the admission knows beforehand just what it is, and there is less need for liberal rules in his behalf than in the other case. It is well settled that, where use is made in a judicial proceeding of a prior declaration, the entire declaration at the time made so far as relevant must be taken together. A party may not utilize only so much of the declaration as is for his benefit; but he must also admit that which is against his interest, and the whole must stand or fall together. If in a suit upon a note the plaintiff relies for evidence upon the statement of the defendant that he gave the note, he must also accept an accompanying declaration that the note has been paid in

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full, and, if this is all the evidence, the statement stands as a whole and the proofs fail. *Carver v. Tracy*, 3 Johns. 427; *Wailing v. Toll*, 9 Johns. 140; *Credit v. Brown*, 10 Johns. 365; *Mumford v. Whitney*, 15 Wend. 380; *Rouse v. Whited*, 25 N. Y. 170; *Platner v. Plantner*, 78 N. Y. 90, 103. It is only where that part of the declaration which discharges the party making it is in itself highly improbable or is discredited by other evidence that the court may believe one part of the admission and reject the other. *Kelsey v. Bush*, 2 Hill, 440.

These rules are especially applicable and equitable in this case, for here the district attorney requested the relator to make the statement in question, and after the latter had done this with apparent fullness and frankness, waiving all those rights and privileges, which he had in a criminal prosecution, the former official deliberately, after opportunity for full consideration, employed it as a proper statement of facts upon which the magistrate might act. It seems to me that, not only is there no evidence aliunde the statement which contradicts it in the respects wherein it is favorable to the relator, but that, upon the other hand, the depositions confirm it and indicate the absence rather than the presence of a criminal intent to steal the money of the corporation. Concededly the relator derived no pecuniary gain from the expenditure. It does not appear that he had any personal or political end to serve by the contribution, but, so far as we know, individually he may have been deeply interested in the success of some opposing party. He entered upon the plan of expenditure only at the instigation and request of the president of the company, and not of his own original volition. While it appears that the president of the company did suggest this form of contribution as a method, good or bad, logical or otherwise, of deceiving and putting off other applicants for contributions, there is no evidence that the relator ever attempted to conceal his acts, but, upon the other hand, they were disclosed fully even to the criminal au-

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thorities when so requested. No request was made to the officers of the campaign committee for concealment of the fact which was known to them that this was a contribution from the funds of the insurance company. When the time for repayment arrived, the president of the company, although accustomed by virtue of his general powers and without specific authority to make what were known as "disbursements upon executive order," disclosed to the entire finance committee of the insurance company what had been done by the relator and the purpose to repay him from the corporate funds, and, while no formal resolution was passed upon the subject, every member of such committee approved of such payment.

Some importance seems to be attached to the entries which were made upon the books of the company in respect to this repayment, and to the fact that the check was made payable to the firm of which the relator was a member rather than to him personally. It affirmatively appears that the relator had no part in making or any knowledge of the entries upon the books of the company, and that the check in repayment was made under the direction of the president of the company rather than the relator. These facts are all established, and must be accepted by the prosecution as true, and there is wanting every one of those circumstances of personal gain, furtive secrecy in the commission of the act and of concealment after commission which, as essential elements, ordinarily attend the crime of larceny, and that, if there is any evidence here of a criminal intent, it is found simply and solely in the fact that the officers of the corporation have contributed some of its funds to an unauthorized purpose. As already indicated, it does not seem to me that this fact is sufficient to sustain the burden thus cast upon it.

In *McCourt v. People*, 64 N. Y. 583, the plaintiff in error stopped at a house and asked the daughter of the owner for a drink of cider, offering to pay for it. She refused to let him have it, and he thereupon opened the cellar door, and,

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although forbidden to do so by her, went in and drew some cider. He was indicted for burglary and larceny, and it was held that the trial court committed error in refusing to direct his acquittal. It is said: "Every taking by one person of the personal property of another, without his consent, is not larceny; and this, although it was taken without right or claim of right, and for the purpose of appropriating it to the use of the taker. Superadded to this, there must have been a felonious intent; for without it there was no crime. It would, in the absence of such an intent, be a bare trespass, which, however aggravated, would not be a crime. It is the criminal mind and purpose going with the act which distinguishes a criminal trespass from a mere civil injury." And then, further, as applicable to the particular circumstances of that case. "There was not only an absence of the usual indicia of a felonious taking, but all of the circumstances proved are consistent with the view that the transaction was a trespass merely. To find this transaction a larceny it is necessary to override the ordinary presumption of innocence and to reject a construction of the prisoner's conduct, which accounts for all the circumstances proved without imputing crime, and to impute a criminal intention, in the absence of the earmarks which ordinarily attend and characterize it."

It is true that this was said with reference to the evidence produced upon a trial, but a decision denying as matter of law to given facts the requisite probative force must be applicable at any other stage where there is need for such proof.

CULLEN, C. J. (dissenting).—I dissent from the decision about to be made. The relator, having been arrested under a warrant charging him with the commission of grand larceny, sued out in the Supreme Court a writ of habeas corpus, in aid of which a writ of certiorari was issued. On the return to the writs the relator was remanded to custody by the

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Special Term. This order was reversed by the Appellate Division and the relator discharged, and from that order an appeal is brought to this court.

That the warrant was sufficient on its face is unquestioned, and the ground on which the relator has been discharged is that the depositions before the magistrate were insufficient to justify the issue of the warrant. Doubtless, where there is no evidence in the depositions tending to show the commission of the crime and the guilt of the defendant, the court may go behind the warrant and discharge the prisoner. Church on Habeas Corpus, section 286. But there must constantly be borne in mind the radical distinction between the proof requisite for the issue of a warrant and that required for conviction on the trial of the defendant. In the latter case the proof must establish guilt beyond a reasonable doubt. In the former it is sufficient that the evidence shows reasonable ground to believe that the defendant has committed a crime (Code Cr. Pro., section 150), or, as commonly said, a case of probable cause. If there is no evidence whatever justifying the inference of guilt, the magistrate acts without jurisdiction, the process is illegal, and both the magistrate and the party suing out the warrant are liable as trespassers; but if "the evidence produced was colorable—something upon which the judicial mind was called upon to act in determining the question of probable cause"—the magistrate had jurisdiction, and the warrant was valid. Pratt v. Bogardus, 49 Barb. 89. It must be further borne in mind that the relator was discharged before examination, and the distinction between a discharge upon the warrant and the depositions on which it was issued and a discharge after examination is important. In the first case the discharge proceeds on the theory that the arrest is absolutely illegal, the case being destitute of any evidence of guilt calling for a judicial determination, while after examination the Supreme Court, as the successor of the King's Bench, may even on habeas corpus, review the evidence

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and reverse the decision of the magistrate. But, as pointed out by Church in his work on Habeas Corpus (section 234; see, also, Hurd on Habeas Corpus, c. 6, sections 3, 4, 5), such power in reality springs from the superiority and appellate power of the court issuing the writ, and not from the habeas corpus act. Therefore the question presented to us is the same as that which would arise were the relator to sue the magistrate for false imprisonment in having issued the warrant. If in such an action the court ought to instruct the jury that, as a matter of law, the arrest of the relator was illegal, the relator has properly been discharged; if not, not.

We are therefore brought to the question whether there was any evidence in the depositions tending to show that the relator had been guilty of a crime; for, "when the proof has a legal tendency to make out a proper case, in all its parts, for issuing the process, then although the proof may be slight and inconclusive, the process may be valid, until it is set aside by a direct proceeding for that purpose." *Miller v. Brinkerhoff*, 4 Denio, 118. In *Swart v. Rickard*, 148 N. Y. 264, it was held that a deposition stating "deponent believes and has reason to believe that said store was broken into and burglarized by James H. Swart and Wallace Van Evera and another, from the fact that said parties were about that time—*i. e.*, after one o'clock that night—prowling around and near the premises," was sufficient to give the magistrate jurisdiction to issue the warrant and to defeat an action for false imprisonment. In that case Judge Martin, writing for the court, said: "The deposition contained a statement of facts which was sufficient to call upon the magistrate for judicial consideration and determination, and tended to prove the guilt of the respondent."

It is not necessary to consider whether the facts stated in the depositions would make out a case of larceny at common law; because for more than a century embezzlement by clerks, agents, and officers had been made criminal by statute, and

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the effect of the Penal Code was to abolish the distinction between the two crimes, and make both larceny. By section 528 of the Penal Code, "a person who with the intent to deprive or defraud the true owner of his property, or of the use and benefit thereof, or to appropriate the same to the use of the taker, or of any other person * * * having in his possession, custody, or control, as a bailee, servant, attorney, agent, clerk, trustee, or officer of any person, association or corporation * * * any money, property, evidence of debt or contract, article of value of any nature, or thing in action or possession, appropriates the same to his own use, or that of any person other than the true owner or person entitled to the benefit thereof; steals such property, and is guilty of larceny." The depositions show that in September, 1904, the relator, who was a trustee and vice-president of the New York Life Insurance Company, had a conversation with the president of said company, in which the latter stated that he had promised to contribute to Cornelius N. Bliss, treasurer of the Republican National Committee, the sum of \$50,000, or so much thereof as might be necessary for the purpose of the Republican campaign. It was then substantially agreed between the parties that the relator should pay the money out of his own funds and thereafter be repaid by the company. In pursuance of this understanding the relator did pay Bliss sums aggregating \$48,500. On December 30, 1904, the relator demanded repayment of the sums advanced by him, which was made by order of the president through the method of a check of the company drawn, not to the order of the relator personally, but to that of J. P. Morgan & Co., a firm of bankers of which the relator was a member. This occurred at a meeting of the finance committee at which the relator's agreement with the president was stated, but no vote authorizing the payment was taken and no minutes of the transaction entered. In the stub of the company's check book the entry was made, "No. 7283 Dec. 30, 1904, Charge Hanover Office ac. Order

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of J. P. Morgan & Co. 48,702.50," and in the books of account, the following: "1904, Dec. 30. Hanover Office Account charged—Treasury Department. Cheque J. P. Morgan & Co. \$48,702.50. Entry made by Mattison. Hanover Bank Office Account: Charged Ledger Bo. 3.—Treasury Department. 1904. Dec. 30. By order of President \$48,702.50. Entry made in ledger by Mattison." In the deposition of Darwin P. Kingsley, it is averred that the president of the company, "by virtue of his office, had power, to make disbursements known as disbursements upon executive order; and that said president did not ask the committee as such to take official action on the transaction narrated, but desired to inform the committee of the facts." There was submitted to the magistrate a written statement made by the relator to the district attorney, in which he admitted the understanding with the president as to the payment of the moneys by him to Bliss, and their repayment by the check of the company. He denied knowledge of the entries in the company's books, and asserted that, when he made the advances and was reimbursed therefor, "it never occurred to me [him] that there could be any question as to the propriety of such expenditure, which I believe to be for the benefit of the company."

It is also unnecessary to consider whether the relator as an officer of the company had at the time in his "possession, custody, or control" the funds or property of the company within the provisions of the Penal Code. Certainly the president had such custody and control, and by section 29 of the Penal Code a person who aids or abets the commission of a crime, or directly or indirectly counsels its commission, is equally a principal with the person who commits the acts. Nor have the provisions of section 548, that it is a sufficient defense to indictment for larceny that the property was appropriated openly under a claim of title in good faith, any application to the case. The crime, if there was any in this case, commenced when the original agreement was made

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between the relator and the president, by which the money of the company was to be appropriated to the use of Bliss, and the method was adopted, for the purpose of concealing such appropriation, that the relator should in the first instance pay the money to Bliss, and thereafter receive the money of the company. The repayment to the relator was not an independant transaction, but part of the original scheme, and must stand or fall with the legality or criminality of that scheme.

It thus appears that by the joint action of the relator and the president of the company this large sum of money was taken from the funds of the company and given to Cornelius Bliss for expenditure for political purposes. Mr. Bliss, neither in his personal nor in his representative capacity, had any claim on the company for the money, legal, equitable or moral. The company was to be permanently deprived of it, for it never was to be returned, nor was any consideration to inure to the company for the money paid. The purpose for which it was to be employed was wholly foreign to the business of the corporation, and one in which the company had no possible interest, except that of every citizen in the good government of the country. That this was an illegal misappropriation of the company's funds, for which every director or officer engaged therein was personally liable to the corporation, seems to me too clear for debate. A majority of the Appellate Division so held, and, as I read the opinion of my Brother GRAY, this court is of the same opinion. Hence it is unnecessary to pursue the discussion of this question further. The relator, therefore, falls exactly within the provisions of the Penal Code, so far as the act is involved, not dealing for the moment with the question of the relator's intent or his belief as to his own authority or that of the president. He has without right deprived the company of its property and appropriated the same to the use of another person not the owner nor entitled to the benefit thereof.

But it is said by the judges of the Appellate Division that

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the misappropriation of the moneys was simply *ultra vires*, and not illegal, and reliance is placed upon a quotation from the opinion of Judge Comstock in *Bissel v. Michigan Southern & N. I. R. R. Co.*, 22 N. Y. 258, where he said: "A subscription made by authority of the board of directors and under the corporate seal for the building of a church or college, or an almshouse, would be clearly *ultra vires*, but it would not be illegal." By a singular fatality there has been entirely overlooked the very next sentence to the one quoted: "If every corporator should expressly assent to such an application of the funds, it would still be *ultra vires*, but no wrong would be committed and no public interest violated." Doubtless the action or contract of a corporation may be *ultra vires*, and yet be vicious in no other respect, but also the action of a board of directors of a corporation may be not only *ultra vires*, but criminal. If a bank should purchase and operate a railroad, the action would be, in the absence of any statutory provision on the subject, simply *ultra vires*, and the corporation could not defend an action against it by a passenger for personal injuries on the plea that the operation of the road was beyond its corporate powers. If, however, the directors of a bank should direct the assets of the corporation to be divided among themselves, to the exclusion of the stockholders, the action would not only be *ultra vires*, but, on the part of the directors, who might receive the money under the resolution, simply theft. The appropriation of the funds or property of a corporation towards an enterprise or business upon which the corporation is not under its charter authorized to embark is merely *ultra vires*, if the enterprise is prosecuted for the benefit of the corporation. But when the money or property is applied, not for the use or benefit of the corporation, but for that of third persons, the act is either a tort or a crime, regardless of the question whether the purpose to which the money is applied is one which the corporation under its charter might or might not have pursued. In other words, where the money is applied

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to the use of a corporation, but to an unauthorized use, it is *ultra vires*; where it is applied to the use of third parties, it is a wrong.

There is this further answer to the argument of the Appellate Division. There is no proof that the corporation authorized the payment to Bliss, and, as it would have been an illegal act on the part of the directors (from whom it seems to have been concealed), it must be assumed in the absence of proof to the contrary that it was not authorized. "Power to bind the corporation can be presumed to exist only in its executive agents and officers within the scope of its ordinary business and their ordinary duties." *First National Bank of Lyons v. Ocean National Bank*, 60 N. Y. 278. It appears by a statement in one of the affidavits already quoted that the president, by virtue of his office, "had power to make disbursements known as disbursements upon executive order." Plainly the authority so given to the president was solely to make disbursements for the use and benefit of the corporation. If that is to be construed as an authority for the president to appropriate the moneys of the company for whatever purpose he chose, and for the benefit of any person he might desire to befriend, regardless of any interest of the corporation in the appropriation, then it is sufficient to say that all the parties were engaged in the criminal conspiracy to loot the company, and this, instead of relieving the relator from responsibility, would emphasize his offence. It must be remembered that the relator was not a mere clerk or subordinate, to whom the word of the president was law, and whose means of livelihood might be dependent on the president's favor, but a trustee and vice-president of the company, and a member of one of the greatest banking firms in the country. He owed the company the duty, not only of abstaining from participating in any misappropriation of the funds by the president, but of aggressive action against the president to prevent or expose such misappropriation. Surely no one will pretend that the authority

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so given the president would have authorized the relator to advance, with the agreement for repayment from the company's funds, \$50,000 to buy a diamond necklace for a woman, and there is nothing wrong in buying a necklace for a woman if a man pays for it with his own money. There is a distinction between the two cases, in that it is even more apparent in the necklace purchase than in the payment to Bliss that the expenditure was for a subject in which the corporation had no interest. But the very distinction proves that the authority of the president was not unlimited or unqualified. It is only fair to the relator, however, to say that his claim is not that the authority of the president was unlimited, but his belief that the payment was not for the benefit of the company, and therefore within the authority of the president.

Something is also said in the opinion below of the beneficent character of the purpose to which the money was appropriated. Of that we can hardly take judicial notice. Probably at all times it would be regarded as beneficent in Vermont and maleficent in Georgia, while in New York its character would vary from year to year. The meritorious character of the object to which the money was appropriated has no bearing on the question of larceny. The gist of that offence is not the application of money to a bad purpose, but taking money that does not belong to the taker to appropriate to an object good or bad. It is the fraudulent deprivation of an owner of his property that constitutes larceny. It is a crime to steal, even though with the intent to give away in charity and relieve distress. *Regina v. White*, 9 C. & P. 434. I do not assert that it is immaterial which party is in control of the government of the nation, and that the subject is a matter of indifference to the citizen. If this were so, the profession of political faith would be mere hypocrisy. If the citizen, with his own means contributes to legitimate political expense to secure the success of the party which he deems will most inure to the welfare of the

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nation, his action is laudable, and, even if the inducement be the belief that the success of that party will inure to the advancement of his personal interest, as distinguished from that of the country at large, it may be justifiable; but to apply the money of another without his consent to such an object is neither laudable nor justifiable, but dishonest. The money given to Bliss belonged neither to the president nor to the relator, but was simply in their custody. Its legal owner was the artificial being, the corporation. Its beneficial owners were the policyholders. With the immense business carried on by the corporation, policies issued in every part of the country and to persons of every political party, both the relator and the president must have well known that the universal assent of the policyholders, the only thing which could have justified, even morally (not legally), the payment to Bliss, could never be obtained, and that at all times a substantial minority would be opposed to such payment. But, though there was an illegal misappropriation of the corporate funds by the relator, this does not necessarily prove that he was guilty of larceny. It may have been simply a trespass for which he is only civilly liable. I agree with Judge GRAY that to constitute larceny there must be what is termed a felonious intent, but we do not make progress towards the determination of the question before us unless we ascertain what is a felonious intent. The question has given rise to much discussion in text-books and in judicial opinions. Whether "intent" is the proper term to employ may well be doubted. Though a man may commit many statutory offences unwittingly, no one can become a thief or an embezzler accidentally or by mistake. To constitute the offence, there must be in the perpetrator the consciousness of the dishonesty of the act. This, however, as frequently turns on the knowledge or belief of the party as to his authority as on his intent regarding the disposition of the property. It is not necessary either at common law or under the statute that the intent should be

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the profit of the taker, for, as already said, it is theft to take property to give away as well as to keep for one's self. In the present case no one will doubt that had a clerk taken from the company's till a sum of money to give to the Republican Club of his ward it would have been larceny. Whatever distinction there may be between the hypothetical case and that of this relator does not lie in the object for which the moneys were appropriated, for that in each case would be the same, but in the difference between the authority over the corporate funds possessed by the mere clerk and by the president and vice-president. The clerk, of course, would know that he had no authority to so divert the corporate funds. The president and the relator might, though they should have known to the contrary, possibly have entertained a different view on the subject.

This brings us to the real, and to my mind, the only question in this case. As has been already said, the relator and the president of the company, without the authority of the corporation and knowing that all the beneficial owners would never assent to the act, took the moneys of the company without consideration and appropriated them to the exclusive use of a third party. The relator must be presumed to have known the law and to have intended the natural consequences of his acts, which were to deprive the company of the money. If he knew the illegality of his act and his intention was solely to benefit either Mr. Bliss personally or the political organization which he represented, then he was guilty of larceny. If, however, as asserted in his statements to the district attorney, he believed that the expenditure would be for the benefit of the company and that the president had the power to make the same, then, however mistaken on the subject, he was not guilty. This was necessarily and properly a question of fact to be determined by the magistrate, not one of law. Though the prosecution put in evidence before the magistrate the written statement of the relator, the magistrate was at liberty to

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believe it or to reject it in whole or in part. *People v. Van Zile*, 143 N. Y. 368; *Becker v. Koch*, 104 N. Y. 394; *President, etc., Manhattan Co. v. Phillips*, 109 N. Y. 383.

The indirect method in which the payment to Mr. Bliss was made and the fact concealed by having the money in the first instance advanced by the relator instead of by the company, and the method in which the relator was reimbursed by a check not to him personally, but to the order of J. P. Morgan & Co., a banking firm with which the corporation may have large legitimate dealings, casts suspicion on the good faith of the relator, and might be considered by the magistrate as militating against him. The explanation of this course offered by the relator, that it was to relieve the president from solicitations from other political parties, might also be discredited. It is difficult to imagine how the representatives of other parties would have access to the company's books; nor would the scheme of payment enable the officers of the company when solicited to say that the company had made no contributions to other parties, because such an answer would be as essentially a falsehood as if the money had been paid by the company in the first instance. The concealment of the payment as described would warrant the magistrate in finding that the parties were conscious of wrongdoing in making it and feared exposure. The relator asserts that he was ignorant of the character of the entries made in the company's books, and there is no proof to the contrary of this statement. But he must have known that the check to pay him was drawn, not to himself, but to Morgan & Co. On the other hand, there is, doubtless, to be considered in the relator's favor the fact that he made no pecuniary profit by the transaction, and that he afterwards openly admitted his participation in it. All this, however, merely raised a question of fact, to be passed on by the magistrate, with whose determination other courts cannot interfere in this proceeding.

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In the very recent case of *Tyson v. Bauland*, 186 N. Y. 397, which was an action for false imprisonment, the plaintiff, a woman entirely reputable, but in the humbler walks of life, was arrested for theft in a department store. The prosecuting witness had placed her bag containing money with other articles on a counter in the store while she was examining goods. The bag was missed. Afterwards the plaintiff was discovered with it going towards the door. She surrendered it to the prosecuting witness, stating that it had been given to her by a woman in another part of the store, who directed her to carry it to a lady whom she would find at the door. On opening the bag it was discovered that the money had been taken therefrom. The plaintiff was arrested, but the grand jury evidently believed her story, for it failed to indict. Thereupon she brought the suit for false imprisonment. We said that the officer was not bound to accept the plaintiff's explanation, and that on the facts there was probable cause for the arrest, although the plaintiff was in fact innocent. It may be in the present case that the relator's character is so good and his standing so high that either on the examination or on the trial it will seem clear that he could not have consciously and knowingly misappropriated the money of the company. It is also but fair to the memory of the president, who is now deceased, to say that it is entirely possible that his standing and character may appear to have been equally as good. The relator is entitled to the full benefit of the presumption arising from such character when presented at the proper place and before the proper tribunal. But, of course, nothing of that nature appears or can appear in the depositions on which the warrants were issued. However high the standing and character of the relator may be, it does not justify a departure in his case from the same orderly course of procedure in the administration of justice which would be followed in the case of the humblest citizen charged with an offence.

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As to the questions discussed in the opinion of Judge HIRSCOCK, with the utmost deference to my learned Brother, I insist that the rule already stated by me of the right of the magistrate to credit part of the statement of the relator and reject the rest applies with the same force to an admission made out of court and put in evidence by the prosecution as it would to testimony given by the relator on the trial itself. I dissent from the doctrine "that, where use is made in a judicial proceeding of a prior declaration, the entire declaration at the time made, so far as relevant, must be taken together. A party may not utilize only so much of the declaration as is for his benefit, but he must also admit that which is against his interest, and the whole must stand or fall together"—though it may be that my Brother intends this to be qualified by his subsequent statements. If the proposition is correct, then the action of the district attorney in laying before the magistrate the declaration of the relator was without justification, because he had proof outside of that declaration of the facts showing the commission of the offence. But I respectfully insist that the law is the reverse. The rule is thus stated by Mr. Greenleaf, referring to admissions made not on the trial: "But though the whole of what he said at the same time, and relating to the same subject, must be given in evidence, yet it does not follow that all the parts of the statement are to be regarded as equally worthy of credit; but it is for the jury to consider, under all the circumstances, how much of the whole statement they deem worthy of belief, including as well the facts asserted by the party in his own favor, as those making against him." Greenleaf on Evidence, section 201. And, referring to confessions in criminal prosecutions: "The jury may believe that part which charges the prisoner, and reject that which is in his favor, if they see sufficient grounds for so doing." *Id.*, section 218. Of course, if the only evidence against a party is his admission or confession, then the adverse party cannot rely on the admission without taking

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the explanation. The cases cited by my learned Brother are of that nature. Even that rule, however, is not unqualified; for, if the explanation is improbable, then it may be rejected, though there is no evidence against the party making it other than the declaration. *Penfield v. Jacobs*, 21 Barb. 335. The case of *Kelsey v. Bush*, 2 Hill, 440, asserts the principle: "If that part of the confession which discharges the party is in itself highly improbable, or if there be evidence aliunde, though but slight, tending to discredit it, the jury may believe one part of the confession and reject the other." In fact, however, under the Code of Criminal Procedure the question can never arise in this bald form in a criminal prosecution, for a conviction cannot be supported by the confession of the defendant without additional proof to show that the crime charged has been committed. Section 198.

The voluntary character of the admission of the act charged against him is doubtless to be considered on the question of his good faith. But the weight to be accorded it may depend very much on the circumstances under which it was made. If, when the charge was first publicly made that the money of the company had been appropriated for a political contribution, the relator admitted the fact and justified it, his conduct would be potent, if not conclusive, evidence in his favor. The offense is charged to have been committed in December, 1904. The relator's declaration was made in March, 1906. If, during this interval, there was a complete exposure of the transaction upon evidence taken before some tribunal or legislative body, of such a conclusive character as to render denial futile and unavailing, the voluntary character of the relator's admission might be deprived of its merit. Any clever offender might, under similar circumstances, not unnaturally, adopt the same course. Of the circumstances under which the admission was made we have, however, no knowledge, but on an examination before the magistrate those circumstances would appear.

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The case of *McCourt v. People*, 64 N. Y. 583, decided no new principle of law. A similar case seems to have arisen as far back as the time of Elizabeth, when a traveler meeting a fisherman, who refused to sell him fish, forcibly took the fish from him, but left with him money exceeding their value. 2 East's Pleas of the Crown, 661. Both cases proceed on the theory that as the party paid or offered to pay more than the value of the goods taken there could be no fraudulent intent. That principle has no relevancy to the present case.

The recent statute prohibiting political contributions by corporations (Law 1906, p. 470, c. 239), and punishing officers and agents making such contributions as for a misdemeanor, does not bear on the question before us. The statute now makes the payment of such contributions criminal, though even every stockholder and every director of the company should expressly authorize and direct it. But, returning to the illustration of the clerk taking the money of the corporation from the till to give to his ward club, the statute will not reduce his offence from larceny to a misdemeanor. The charge against the relator is not that he paid the money to Bliss and received it back from the company, by the authority of the corporation, but that the payment and repayment were made without that authority.

The order of the Appellate Division should be reversed, and that of the Special Term affirmed.

WERNER, J. (dissenting.)—If the question were whether the relator's guilt of the crime of larceny as charged in the information had been established according to the immemorial rule which obtains in criminal trials, and which imperatively demands proof of guilt beyond a reasonable doubt to justify a conviction, I should unhesitatingly vote in the negative, for the evidence which the magistrate had before him when he was called upon to issue the warrant concededly falls far short of that standard. But that is not the

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question before us. The only question we are called upon to consider, and, indeed, the only one we have the right now to decide, is whether the evidence before the magistrate invested him with jurisdiction to issue the warrant; in other words, whether the evidence before him was of such a character as to impose upon him the duty of judicially determining whether there was probable cause to believe that the crime charged had been committed. It is not our province now to inquire whether his decision may have been correct or erroneous, but our duty begins and ends in passing upon his right to decide that question at all. If he had before him any evidence calling for the exercise of his judicial judgment as to whether there was probable cause to believe that the crime charged had been committed, it invested him with jurisdiction, and in that event the writ of habeas corpus issued herein must be dismissed. I think there was evidence enough before the magistrate to give him jurisdiction, and therefore vote for reversal of the order or the Appellate Division upon the opinion written by Chief Judge CULLEN.

O'BRIEN and EDWARD T. BARTLETT, JJ., concur with GRAY and HISCOCK, JJ.; CHASE, J., concurs with CULLEN, C. J., and WERNER, J.

Order affirmed.

Dwyer v. Slattery.

EDWARD DWYER, RESPONDENT, v. JOHN SLATTERY, APPELLANT.

SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT, MARCH, 1907.

§ 531.

Pleadings—Bill of particulars.

The right of a defendant to a bill of particulars, under Code Civil Procedure, section 531, in an action in which the complaint alleged in general terms that the plaintiff was hit by a flying rock and splinters, scattered by an explosion caused through the negligence of the defendant and his servants, and particularly because of the failure of the defendant to make and enforce proper rules for the safe conduct of such work, and by the negligence of the person employed as superintendent,—will not be denied on the ground that the defendant knew as much about the cause of the accident as the plaintiff, since the purpose of the bill is to amplify the pleadings, and therefore the defendant was entitled to know what the plaintiff will claim upon the trial respecting the following matters: "Whether the work of blasting was under the personal charge of defendant at the time of the accident, or in charge of an employé, and his name or a description of him and his duties; in what claimed negligent manner the blast was fired, or from what claimed negligent cause; what rules should have been made for blasting or warning; or what existing rule was disregarded temporarily or habitually."

(*Decided March, 1907.*)

Appeal by defendant from an order of the Special Term of New York County denying his motion for a bill of particulars. **Reversed.**

Dwyer v. Slattery.

Mr. William F. Clare, for appellant.

Mr. Louis F. Sonnenberg, for respondent.

HOUGHTON, J.—The action is by an employé to recover for injuries alleged to have been caused by the negligence of the employer in the conduct and management of blasting an excavation for a building. The complaint alleged, in general terms, that plaintiff was hit by flying rock and splinters scattered by the explosion through the carelessness and negligence of the defendant and his agents or servants, and particularly because of the failure of defendant to make and enforce proper rules for the safe conduct of such work and by the negligence of the person employed by the defendant to superintend the same. The defendant moved that the plaintiff furnish a bill of particulars, setting forth his claim as to whether the defendant was personally in charge of the work, or whether it was in charge of a servant, and, if so, who such servant was or what position he occupied, and in what particular the blast was improperly fired, and of what the negligence therein consisted, and what rules would have been made for the greater safety of the work. The motion was denied, and the order of denial is attempted to be sustained on the ground that the defendant knew as much about the cause of the accident as the plaintiff, and possibly more.

This answer does not meet the situation. The question in applications of this kind is, not what may have been the actual facts, nor the knowledge of the opposite party concerning them, but rather what the aggrieved party claims them to be. What they claim to be is the issue that is to be met and tried; and where the pleading is not specific in this regard a bill of particulars is properly ordered to point out such claims and thus make definite the issues to be litigated. It is not the office of a bill of particulars to expose to his adversary the evidence of the party giving it. The purpose of such a bill is to amplify the pleadings and to in-

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dicate, with more particularity than is ordinarily required in a formal plea, the nature of the claim made, in order that surprise upon the trial may be avoided and that the issues may be more intelligently met. *Slingerland v. Corwin*, 105 App. Div. 310, 93 N. Y. Supp. 953. We think the defendant was entitled to know what the plaintiff will claim upon the trial respecting the following matters: Whether the work of blasting was under the personal charge of defendant at the time of the accident, or in charge of an employé, and his name or a description of him and his duties; in what claimed negligent manner the blast was fired, or from what claimed negligent cause; what rules should have been made for blasting or warning; or what existing rule was disregarded temporarily or habitually. To this extent the order for a bill of particulars should have been granted.

The order is reversed, without costs, and the motion granted as indicated, without costs. All concur.

THOMAS H. MCINTYRE, APPELLANT *v.* ELMER E.
SMATHERS, RESPONDENT.

SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT, APRIL, 1907.

§ 501.

Counter-claim—Action on contract or tort.

Under Code of Civil Procedure, section 501, subdivision 2, which provides for counter-claim on actions on contracts, a complaint which alleges title to personal property in the plaintiff under a promise by defendant to deliver it upon demand, and demand and refusal was made, sets out an action for conversion, and a counter-claim may not be litigated in such action.

(Decided April, 1907.)

McIntyre v. Smathers.

Appeal by plaintiff from Special Term, New York County, from a judgment overruling a demurrer to a counter-claim. Reversed.

Mr. Maurice Leon, for appellant.

Mr. John M. Stearns, for respondent.

LAMBERT, J.—If the complaint sets out an action on contract, then the counter-claim may be litigated in this action, under subdivision 2 of section 501 of the Code of Civil Procedure. If, on the contrary, it is in tort, the judgment must be reversed.

The complaint alleges the title to the personal property in the plaintiff under a promise by defendant to deliver it upon demand. Demand was made and refused. It is clearly a case where possession by the defendant until demand made was rightful, but the detention after demand is wrongful, and it amounted to a conversion at the election of the plaintiff. The title to the personal property in question is placed in the plaintiff by the allegations of the complaint, with the right of possession upon demand. It must be apparent that a refusal to surrender possession as an incident to the title constituted conversion.

Interlocutory judgment reversed, with costs, and demurrer sustained, with costs, with leave to defendant to amend within 20 days after entry of order and payment of costs. All concur.

Oakes v. Riter et al.

CHANDLER A. OAKES v. THOMAS B. RITER ET AL.

SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT, APRIL, 1907.

§§ 887, 888, 889.

Depositions—Right to take.

The Code Civil Procedure, section 887, providing that in cases specified in section 888, where it appears by affidavit on the application of either party that the testimony of a witness not within the State is material, a commission may be issued to examine the witness. Section 888, subd. 5, providing that such a commission may be issued where an issue of fact has been joined and the testimony is material to the applicant. Section 889 providing that the application must be granted upon satisfactory proof of the facts authorizing it, unless the court has reason to believe that the application is not made in good faith. *Held*, that where on a motion for a commission to take defendant's testimony, the moving papers set up the necessary facts as prescribed by sections 887 and 888, and there was nothing in the papers furnishing reason to believe that the application was in bad faith, the defendant was entitled to have the commission issue.

(Decided April, 1907.)

From an order denying his motion for the issuance of a commission to take testimony upon written interrogatories, Thomas B. Riter appeals from Special Term, New York County. Reversed, and motion granted.

Messrs. McElheny & Bennett (William M. Bennett, of counsel), for appellant.

Mr. Albert I. Sire, for respondent.

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CLARKE, J.—The defendant Riter is a nonresident of the State of New York and is now without the state, being in the City of Pittsburg, Pa., where he resides. An issue of fact has been joined, and the testimony of the defendant is material. Said defendant applied to the Special Term for an order for the issuance of a commission for the purpose of taking his testimony to be used upon the trial upon written interrogatories. The moving papers set up the necessary facts as prescribed by sections 887 and 888 of the Code of Civil Procedure, and in addition thereto that said Riter was seriously ill and confined to his bed in the City of Pittsburg.

Section 887 provides that:

"In a case specified in the next section, where it appears by affidavit on the application of either party that the testimony of one or more witnesses not within the state is material to the applicant, a commission may be issued. * * * The applicant or any other party to the action may be thus examined."

Section 888 provides that:

"Such a commission may be issued; * * * (5) Where an issue of fact has been joined in an action pending in a court of record and the testimony is material to the applicant in the prosecution or defense thereof."

Section 889 provides that:

"An order * * * must be granted upon satisfactory proof of the facts authorizing it, unless the court or judge has reason to believe that the application is not made in good faith, or unless an order for an open commission or for taking depositions is made as prescribed in this article."

There is nothing in these papers furnishing a reason to believe that the application is not made in good faith. In the absence of bad faith, the provision is mandatory. All that is necessary to appear to justify the granting of the motion for a commission is that the action should be one mentioned under section 888 and that the testimony of one

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or more witnesses, not within the state, is material to the applicant. *Laidlaw v. Stimson*, 67 App. Div. 545, 74 N. Y. Supp. 684. "The commission may, in a proper case, issue to examine a party, as well as a witness, upon interrogatories, pursuant to section 887 of the Code of Civil Procedure." *Ordway v. Radigan*, 114 App. Div. 538, 100 N. Y. Supp. 121.

The order appealed from should be reversed, with \$10 costs and disbursements, and the motion granted, with \$10 costs. All concur.

MARY E. TRAVIS, AN INFANT, v. RUDOLF M. HAAN.

SUPREME COURT, APPELLATE DIVISION, SECOND DEPARTMENT, APRIL, 1907.

§ 834.

Witness—Confidential relations between physician and patient.

The Code of Civil Procedure provides that a physician shall not be allowed to disclose information acquired in attending a patient in a professional capacity. The prohibition of that section only applies to information of patient to physician "which was necessary to enable him to act in that capacity," and the physician was not prohibited from testifying, since the patient did not need to tell him that she carelessly got her hand into the machine, to enable him to treat the injuries.

(Decided April, 1907.)

Appeal from Trial Term, Kings County.

Defendant appeals from a judgment for plaintiff. Reversed, and new trial granted.

Mr. David F. Manning, for appellant.

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Mr. William E. C. Mayer (James Crooke McLeer, on the brief), for respondent.

GAYNOR, J.—The plaintiff was at work feeding a mangle. She had to spread the linen piece out upon a feed apron, which carried it along to the rollers and steam-heated cylinders of the mangle, through which it went. In some way the plaintiff's hand got in between the first roller and the cylinder. She was unable to tell how it happened. She did not need in the work to put her hand against the cylinder or roller. On these facts the plaintiff was not entitled to recover as the law formerly was. *Hickey v. Taaffe*, 105 N. Y. 26.

This machine had a small wooden guard roller across the apron, two fingers' width or more from the cylinder, but it had been taken off about two weeks before the accident by the foreman. The plaintiff did not ask to have it put back; the workers, it appears, did not like it; it rubbed the ends of their fingers. The plaintiff understood all about it and the machine, and was willing to work without it. Labor Law, Laws 1897, p. 480, c. 415, section 81, requires machinery to be properly guarded, but a statutory obligation of employer to employé is on the same footing, and no more than a common law obligation. Each is simply a legal obligation, and the one may be waived the same as the other. It is a simple matter over which words have been multiplied. *Kinsley v. Pratt*, 148 N. Y. 372.

But chapter 600, p. 1750, of the laws of 1902, sometimes called the "Employer's Liability Act," no longer permits the courts to rule as matter of law, in an action brought under that act, as is the case of this action, that an employé assumes the risk caused by the employer's failure to discharge any duty of safety, or is guilty of contributory negligence, by continuing in the work with knowledge of such failure. Section 3. The trial judge therefore properly submitted those questions to the jury.

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The exclusion of the testimony of the doctor of what the plaintiff told him of how the accident happened was reversible error. That he was treating her professionally did not make the evidence inadmissible under section 834 of the Code of Civil Procedure upon her objection. The prohibition of that section only applies to information of patient to physician "which was necessary to enable him to act in that capacity." She did not need to tell him that she carelessly got her hand into the machine to enable him to treat the injuries to it. *Green v. Met. St. R. Co.*, 171 N. Y. 201.

The judgment and order must be reversed.

Judgment and order reversed, and new trial granted; costs to abide the event. All concur.

MAYNARD N. CLEMENT, STATE COM'R OF EXCISE,
v. RUDOLPH O. MAST ET AL.

SUPREME COURT, APPELLATE DIVISION, SECOND DE-
PARTMENT, MAY, 1907.

§ 791.

Appeal—Denial of motion to set case for trial.

Where a State officer who brings an action as such, fails to avail himself of the right given by Code Civil Procedure, section 791, subd. 1, to move for trial on the day stated in his notice of trial, his motion to set the case for trial on a subsequent day is addressed to the discretion of the trial court, which will not be reviewed, unless improperly exercised.

(*Decided May, 1907.*)

Appeal from Trial Term, Westchester County.

Clement v. Mast et al.

From an order denying a motion that the action be preferred and set for trial, plaintiff appeals. Affirmed.

Mr. Albert O. Briggs (Herbert H. Kellogg, on the brief), for appellant.

RICH, J.—The plaintiff appeals from an order denying a motion that his action be preferred and set for trial during the January, 1907, trial term of the Supreme Court held in and for the county of Westchester. His contention is based upon the provisions of subdivision 1 of section 791 of the Code of Civil Procedure.

The action is brought by a state officer as such, and is clearly within the provisions of that subdivision, and the notice of trial stated, as required to give the action a preference, that it would be moved as a preferred cause on January 7, 1907, at the opening of the court on that day or as soon thereafter as counsel could be heard. The provisions of the Code made the action a preferred cause without action of the trial court, and the plaintiff had an absolute right to move it for trial on the day and at the time stated in his notice, or if the court was then otherwise occupied, as soon thereafter as he could be heard; and, had he done so, his right to a trial would be beyond question. Instead of availing himself of his absolute right, he moved for an order declaring the action a preferred cause and setting it for trial at some later day in the term, which in effect waived his right to move the cause, and sought relief which was within the discretion of the court. Section 791, subd. 1, provides:

“ If the action or special proceeding is not moved by said attorney for trial or argument on that day, or as soon thereafter in the same term as the court can hear it, the other party may then move the trial or argument; otherwise it shall not be moved out of its order at that term except by the special order of the court.”

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There is nothing in the record showing that the plaintiff moved the case for trial on the day selected by him; but he did move for the special order authorized by this subdivision, and this motion was addressed to the discretion of the trial court, and we cannot say that it was improperly exercised.

The order must be affirmed, with \$10 costs and disbursements. All concur.

NETTIE STERN v. MILLARD MARCUSE ET AL.

SUPREME COURT, APPELLATE DIVISION, SECOND DEPARTMENT, MAY, 1907.

§§ 500, 507.

Pleading—Separating and numbering defences.

Code Civil Procedure, section 500, provides that the answer of defendant must contain (1) a general or specific denial of each material allegation of the complaint controverted by defendant; (2) a clear statement of any new matter constituting a defence or counter-claim. Section 507 provides that the defendant may set forth as many defences as he has, and that each defence must be separately stated and numbered. An answer in an action to foreclose a real estate mortgage denied on information and belief that the mortgagee assigned the mortgage to plaintiff, and alleged that the mortgaged property after the making of the mortgage was divided in such a way that the land of the answering defendant was subject to the mortgage only second to the part owned by the other defendant, and that the latter defendant paid the mortgagee the whole of the mortgage. *Held* that a motion to separate the denial from the defence of new matter was improperly denied.

Jenks, J., dissenting.
(Decided May, 1907.)

Stern v. Marcuse et al.

Appeal from Special Term, Westchester County.

Action by Nettie Stern against Millard Marcuse and others. From an order denying a motion to separately state and number defenses, plaintiff appeals. Reversed, and motion granted.

Mr. Milton Mayer, for appellant.

Mr. David Ross, for respondents.

GAYNOR, J.—This is an action to foreclose a mortgage on real property. The complaint alleges the assignment of the bond and mortgage to the plaintiff by the mortgagee, the Harlem Savings Bank. The answer consists of an unscientific, rambling statement, such as a layman might possibly draw, in the middle of which is this:

“Upon information and belief this defendant denies that the Harlem Savings Bank sold or assigned said bond and mortgage to the plaintiff, or that the plaintiff is the lawful owner or holder of the said bond and mortgage, or possessed thereof.”

All that can be made out of the rest is a claim that the mortgaged property, after the making of the mortgage was divided, title to part being conveyed to this answering defendant and the other part to another person, also a defendant, in a way that made the land of this answering defendant subject to the mortgage only second to the part owned by the said other defendant; and that the latter defendant paid the said Harlem Savings Bank the whole of the said mortgage in discharge thereof. This new matter is alleged as a defence.

This motion is in so many words to separate the said denial from the said defense of new matter. The case of *Goldberg v. Utley*, 60 N. Y. 427, cited in the opinion of

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Mr. Justice JENKS, has nothing whatever to do with the question presented. It merely decides that the Court of Appeals at that time had not the right to entertain an appeal from an order made on a motion like this, for the reason that it did not involve a substantial right. Nor does the other case cited in the said opinion, *O'Connor v. Virginia Passenger & Power Co.*, 184 N. Y. 47, in any way touch the question; the question was not in it at all. It only holds that the denial of a motion to have several causes of action separated and numbered, when it should have been granted, cannot prevent a demurrer from being interposed for their improper joinder in the same complaint. Is not their citation inadvertent, or in mistake of the question before us?

The plaintiff is asking no favor but a matter of right. By express provision of the Code of Civil Procedure defences of new matter "must be separately stated and numbered" (section 507), the same as causes of action "must be separate and numbered" (section 483). These are mandatory provisions—they are enjoined by the mandatory word "must"—and we have no right to disregard them. To do so would cause and encourage confusion and disorder. A defence may not be jumbled up with another or other defences, nor with a denial or denials. First come denials in an answer and then new matter constituting a defence, if there be any (section 500).

It is true that the plaintiff might have refrained from making this motion if she saw fit, and answered or demurred to the defence of new matter in its present mixed up condition; but that does not alter the case; she has the right to make the motion, and it is our positive duty to grant it. The fact that our action is not subject to review is no reason for disregarding the statute; on the contrary, it is reason why we should be careful to follow it. By a series of decisions, following *Fletcher v. Jones*, 64 Hun, 274, 19 N. Y. Supp. 47, it was held up to very recently that a de-

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murrer would not lie to a defence of new matter which had a denial of a material part of the complaint mixed up with it, for the reason (as it was said) that the demurrer would not be good against the denial, and would therefore fail. It is true that these decisions are now abandoned, as I understand it, for the educated bar insisted that the defence could be demurred to without being separated at all; that the demurrer was not to the denial but to the defence of new matter; that it was optional with the plaintiff whether he should move to separate; and many now wonder how such decisions came to be made. From the erroneous extreme of these decisions we should not now go to the even more erroneous extreme of refusing to require defences to be separately stated at all.

The order should be reversed and the motion granted.

Order reversed, with \$10 costs and disbursements, and motion granted, with costs. All concur, except JENKS, J., who dissents.

JENKS, J.—I dissent. The appeal is from an order of the Special Term denying a motion that the defendant Kimmerle separately state and number the alleged defenses. The right is but formal, not substantial. *Goldberg v. Utley*, 60 N. Y. 427. Kimmerle, who is made a party to this foreclosure action as asserting some interest in the premises made separate answer. His plea is that he owns a part of premises free from this mortgage, and his prayer is for affirmative relief, or, if that be denied, that his part be excluded from the reach of the judgment or at least the premises, exclusive of his part be first sold, and, if that sale does not satisfy the decree, he may take over the judgment so far as it is unsatisfied upon payment of the amount then due and the expenses of the sale.

I think that the pleader intended to set forth but a single counter-claim, and that the pleading should thus be construed. The alleged "denials" are to be read as subor-

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dinate to this plea, confined to it and consistent with it, which is in effect that such proceedings were had that his part of the premises was freed from this mortgage, and that the defendant Marcuse, instead of taking a satisfaction thereof *pro tanto* and in violation of his legal obligation, caused the mortgage to be assigned to this plaintiff in his own interest, and this suit to be begun in that interest. In fine, the concern of the defendant is with this part of the premises only, and his position is that as to it there is no valid mortgage.

The grievance stated by the appellant is that she cannot demur, save to the entire answer. The denial of this motion does not hinder demurrer. *O'Connor v. Virginia Passenger & Power Co.*, 184 N. Y. 47.

JOHN McVEY v. SECURITY MUT. LIFE INS. CO.

SUPREME COURT, APPELLATE DIVISION, THIRD DEPARTMENT, MARCH, 1907.

§ 481.

Pleadings—Motion to amend complaint.

Under Code Civil Procedure, section 481, subd. 3, providing that the complaint must contain a demand of the judgment to which the plaintiff supposes himself entitled, a prayer for relief is a part of the complaint, and a motion to correct the prayer for relief is one to amend the complaint.

Same—Serving amended complaint.

Where plaintiff, with his motion papers and in his notice of motion, stated fully the exact language of the prayer for equitable relief which he desired to have inserted in the complaint in the place of a prayer for a money judgment, the only purpose of the amendment being to get the case on the equity calendar for

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trial and to remove it from the law calendar, he was not required to serve a copy of the proposed amended complaint with his motion papers.

(*Decided March, 1907.*)

Appeal from Special Term, Broome County.

Plaintiff appeals from an order denying plaintiff's motion to correct the prayer for relief and to have the cause transferred to the equity calendar. Reversed.

Mr. S. Mack Smith, for appellant.

Messrs. Himman, Howard & Kattell, for respondent.

CHESTER, J.—The order appealed from denies the plaintiff's motion to correct the prayer for relief in his complaint and to have the cause transferred from the trial jury to the equity calendar of the court on a preliminary objection that no proposed amended complaint was served. The prayer for relief was for money judgment only. At the time of the commencement of the action it had been decided by this court in a similar action against this defendant that upon the facts alleged and proved the plaintiff was entitled to a money judgment. *Kelly v. Security Mutual Life Insurance Co.*, 106 App. Div. 352, 94 N. Y. Supp. 601. Upon an appeal to the Court of Appeals it was held that upon such facts the plaintiff was entitled, if anything, to a judgment in equity only. 186 N. Y. 16.

The appellant contends that a motion to correct the prayer for relief is not a motion to amend the complaint, and cites authorities holding that the prayer for relief forms no part of the cause of action. But under subdivision 3 of section 481 of the Code of Civil Procedure it is provided that the complaint must contain "a demand of the judgment to which the plaintiff supposes himself entitled." So that, while the prayer for relief is no part of the cause of action, it is a part of the complaint. This motion was, therefore, one to amend

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the complaint. Notwithstanding this, we do not agree with the respondent's counsel, that under the authorities, as applied to the facts here, the plaintiff was required to serve a copy of the proposed amended complaint with his motion papers. When a party seeks to amend his cause of action, that is a salutary rule which should be adhered to; but here the plaintiff expressly disclaims any intention or desire to amend his cause of action. The reason of the rule is that the court and the opposing party may be advised of the exact form and language of the proposed pleading as amended. The defendant has a statement of all the facts constituting the cause of action in the complaint already served and to which it has interposed its answer. The plaintiff is not seeking in any way to change this cause or the facts constituting it. With his motion papers and in his notice of motion he states fully the exact language of the prayer for equitable relief which he desires to have inserted in the complaint in the place of the prayer for a money judgment which he asks to have stricken out. The defendant, therefore, is just as fully advised of the exact terms of the entire proposed amended complaint as if one had been served with the notice of motion. The reason for the application of the rule not existing here, we think it should not have been applied; and, as the only purpose of the amendment appears to have been to get the case on the equity calendar for trial and to remove it from the law calendar, we think it should have been allowed.

The order appealed from should be reversed, with \$10 costs and printing disbursements to the appellant, and the motion granted, on the payment by the plaintiff of \$10 costs of the motion, with leave to the defendant, in view of the demand for equitable, instead of legal, relief, to serve an amended answer, if it should be advised to that effect. All concur.

People ex rel. West Shore Traction Co. v. Bauer et al.

PEOPLE EX REL. WEST SHORE TRACTION CO. v.
FREDERIC W. BAUER ET AL.

SUPREME COURT, SPECIAL TERM, WESTCHESTER COUNTY,
APRIL, 1907.

§ 2097.

Prohibition—Motion to dismiss—Alternative writ.

Code Civil Procedure, section 2097, provides that an objection to the "legal sufficiency of the papers upon which a writ of prohibition was granted may be taken in the return," and that a motion to set aside the alternative writ for any matter not involving the merits must be made at a term where the writ might have been granted. *Held*, that an objection to the sufficiency of the papers upon which a writ was granted may be taken in the return or presented at a Special Term of the court before the return day.

(Decided, April, 1907.)

Motion to set aside a writ of prohibition granted in a proceeding by the people of the State of New York against the president and trustees of the village of Piermont, and another. Motion granted.

Mr. Edw. J. Welch, for relator.

Messrs. White & Case, for defendant Rockland R. Co.

TOMPKINS, J.—A writ of prohibition was granted by the court on April 24, 1907, commanding the defendants to refrain from granting a franchise to the Rockland Railroad Company to construct a line of trolley railroad through the village of Piermont, and was made returnable on the third Saturday of May, at a Special Term to be held at White

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Plains. A motion is now made by the defendants to set aside the said writ upon the papers upon which the same was granted, and upon the grounds that such papers were and are legally insufficient as a foundation for said writ.

The relator has an application pending before the trustees of the village of Piermont for a franchise to build and operate its proposed trolley railroad through and along Piermont avenue, in said village of Piermont. This application has not yet been acted upon by the village board. At the time of the allowance of the writ of prohibition, the defendant the Rockland Railroad Company also had an application pending with the said board of trustees of the village of Piermont for a franchise or consent to construct, maintain, and operate a street railroad through the said village of Piermont, but over and along an entirely different route than that described in the petition of the relator as its route. This application to set aside the writ of prohibition on the ground that the papers upon which it was granted were legally insufficient must be granted. In the first place, there is nothing in the law to prevent the local authorities of a village or town from granting a consent or franchise for the building, maintaining, and operating of a street surface railway to two or more rival companies, provided the routes are not the same. In this case the routes described in the petitions of these two companies are entirely different and do not touch each other at any point.

It is urged on behalf of the relator that the Rockland Railroad Company has no certificate from the state board of railroad commissioners of public convenience and necessity, under section 59 of the railroad law, for the route through the village of Piermont described in its petition and for that reason the village authorities have no right to give the village consent. There is nothing in the railroad law, or in any statute, that requires the granting of the state railroad commissioner's certificate as a prerequisite to

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the granting of local consents or franchises. There is nothing in the law to prevent the Rockland Railroad Company making application for and receiving a certificate of public convenience and necessity after it has received its local franchise.

The papers upon which the writ was granted fail to show any such interest on the part of the relator that entitles it to a writ of prohibition against the village authorities. It owns no property, and is not a taxpayer or resident of the village. It has no vested right and no village consent or franchise, and has applied for none, over the route proposed for the defendant Rockland Railroad Company, and it has no certificate of convenience and necessity for that route. It simply occupies the position of an applicant for the consent of the village authorities for its proposed route, while the Rockland Railroad Company is seeking a like consent for its proposed route. The court will not interfere at such a stage to prevent the exercise by the village authorities of their judgment and discretion.

The argument is made by counsel for the relator that the writ cannot be set aside upon motion, and that the points now made against the sufficiency of the papers should be presented by demurrer or in the return. The Code of Civil Procedure fails to provide for a demurrer to an alternative writ of prohibition, but does provide (section 2097) that an objection to the "legal sufficiency of the papers upon which the writ was granted may be taken in the return," and that a motion to set aside the alternative writ, for any matter not involving the merits, must be made at a term where the writ might have been granted. These provisions justify the inference that an objection to the sufficiency of the papers may be taken in the return, or presented at a Special Term of the court before the return day.

Motion to set aside writ granted.

Untermeyer v. City of Yonkers.

SAMUEL UNTERMYER v. CITY OF YONKERS.

COURT OF APPEALS OF NEW YORK, APRIL, 1907.

§ 1338.

Appeal—Decision of intermediate courts—Ground of reversal.

By the provisions of Code of Civil Procedure, section 1338, where an order of the Appellate Division reversing a judgment entered upon a decision of the trial court is silent as to the grounds of reversal, it must be assumed to be a reversal on questions of law. (*Decided April, 1907.*)

Appeal from Supreme Court, Appellate Division, Second Department.

From an order of the Appellate Division, Second Department (98 N. Y. Supp. 563, 112 App. Div. 308), reversing a judgment issued upon a decision of the Special Term, plaintiff appeals. Order of the Appellate Division reversed, and the judgment entered upon the decision of the trial court affirmed.

Mr. Louis Marshall, for appellant.

Mr. Thomas Curran, for respondent.

PER CURIAM.—The condition of the record in this case leaves us no alternative but to reverse the order of the Appellate Division and to affirm the judgment entered upon the decision at Special Term. The learned trial court made certain findings of fact which, so long as they stand unreversed, must inevitably control the decision of the case if they are supported by evidence. An examination of the record discloses that these findings have the support of some evidence, and, as the order of the Appel-

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late Division is silent as to the grounds upon which it reversed the judgment entered upon the decision of the trial court, it must be assumed to be a reversal purely upon questions of law. Code Civ. Pro., section 1338. Since this court is bound by the facts as thus found by the trial court, and in effect approved by the Appellate Division, the only question open for decision by this court is whether the conclusions of law arrived at by the trial court are sustained by the findings of fact. As to that question there is no doubt whatever. The trial court's conclusions of law are the necessary corollaries of the findings of fact, and the Appellate Division should either have reversed the trial court upon the law and the facts, or have affirmed the judgment.

As it did neither of these things, it follows that the order of the Appellate Division must be reversed, and the judgment entered upon the decision of the trial court affirmed, with costs to the appellant in all courts.

CULLEN, C. J., and GRAY, EDWARD T. BARTLETT, HAIGHT, WERNER, WILLARD BARTLETT, and HISCOCK, JJ., concur.

Ordered accordingly.

WALLACE H. WINQUIST v. JAMES F. PRESTON.

SUPREME COURT, APPELLATE DIVISION, FOURTH
DEPARTMENT, MARCH, 1907.

§ 2983.

Court—Justice's court—Adjournment.

Where, as under the city charter of Buffalo, section 2983 of the Code of Civil Procedure is made applicable to the Municipal Court, and a case is called for trial and a commission is introduced under objection, it is *held*, that an adjournment could properly be taken to allow the correction of the commission. (*Decided March, 1907.*)

Appeal from Special Term, Erie County.

Defendant appeals from an order denying a motion to set aside an order for the examination of the defendant in supplemental proceedings, and to vacate the judgment upon which such proceedings were based. Affirmed.

Mr. Charles Newton, for appellant.*Mr. Peter Maul*, for respondent.

WILLIAMS, J.—The order should be affirmed, with \$10 costs and disbursements.

The motion in County Court was based upon the claim that the judgment was void for want of jurisdiction in the Municipal Court of the City of Buffalo to render the same. It was claimed the court lost jurisdiction of the action by adjourning the same against defendant's objection. The case having been adjourned from time to time by consent of the parties, on May 23, 1906, it was called for trial. A

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commission had previously been issued to take the evidence of witnesses residing in Massachusetts, and had been returned. The plaintiff's counsel attempted to read evidence from this commission, when objection was made by defendant's counsel that the commission was not properly executed. The plaintiff, then, before any evidence was read from the commission or taken from other witnesses, applied for an adjournment of the case to permit the commission to be returned to Massachusetts for correction. The defendant objected to the adjournment upon the ground that the court had no power to adjourn at that time; the trial having been commenced. The court overruled the objection and adjourned the case to June 1, 1906. On the adjourned day the defendant made no appearance, except to object to the jurisdiction of the court to proceed further in the case, having lost jurisdiction thereof by adjourning it without defendant's consent after the trial had begun. The plaintiff made his proof and the judgment was ordered. A transcript was filed in Erie County, and the supplemental proceedings were based thereon.

The question here is whether the judgment is void for want of jurisdiction in the Municipal Court, for the reason alleged. It seemed to be assumed on the trial that the court had power to adjourn the case to have the commission corrected, if it had been done before the trial had commenced. There are provisions in the Code of Civil Procedure for adjournment of cases in Justices' Courts, where commissions are issued, to afford opportunity for the execution and return of the commissions (section 2983), and this provision is applicable to proceedings in the Municipal Court of the City of Buffalo (Charter, section 456). These provisions undoubtedly cover cases where commissions are defectively executed and need to be returned for correction. We might be willing to concur in the defendant's position that a case could not be adjourned in Justices' Courts, or in this Municipal Court, after the trial has commenced.

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In this case, however, there had been really no commencement of the trial. The lawyers and the court had done some talking. Some offers, objections, and rulings had been made, but no evidence had been taken, and we think the court correctly held that the trial had not commenced in such a sense as to deprive the court of the power to adjourn the case for the purpose of procuring the commission to be corrected and returned. Having arrived at this conclusion, we do not deem it essential to pass upon the other questions raised upon this appeal.

Order affirmed, with \$10 costs and disbursements. All concur.

IN RE PAUL JONES & CO.SUPREME COURT, APPELLATE DIVISION, SECOND
DEPARTMENT, MARCH, 1907.

§ 1022.

Attorney and client—Action—Money collected.

When the evidence shows a petition to compel an attorney to turn over moneys alleged to have been collected by him for a client, that no moneys had been received by the attorney, such petition must fail.

Reference—Evidence.

In such a proceeding, no evidence is admissible to prove that in other actions the attorney had failed to pay over money obtained for other clients.

Same—Referee's report—Findings.

Unless there has been a trial of the whole issues of fact, the referee in his report need not, as provided under section 1022 of the Code of Civil Procedure, state the facts found separately from the conclusions of law.

(Decided March, 1907.)

In re Paul Jones & Co.

Appeal from Special Term, Queens County.

Application by Paul Jones & Co. to compel the payment of money received by their attorney as such. From an order confirming the referee's report, Paul Jones & Co. appeal. Affirmance recommended.

Mr. S. S. Myers, for appellant.

Mr. George Wallace, for respondent.

JENKS, J.—This appeal is from an order confirming a referee's report and from "the judgment in said proceeding." The appellant petitioned that Gilbert, as an attorney in charge of its claims against Minister, be compelled to pay over to it \$142, with interest, or be punished for contempt. The ground of the petition was that Gilbert had collected said sum upon a claim. Upon the hearing the Special Term ordered a reference to Henry A. Monfort, Esq., to take such evidence and testimony as might be offered by the respective parties, and to report, with his opinion upon all questions of fact arising upon said motion, and particularly whether the sum of \$142, or any other sum, was actually paid by said Minister to Gilbert on account of Minister's indebtedness to the petitioner. Accordingly the referee reported that the only question litigated before him was whether the sum of \$142, or any other sum, had been actually paid to said Gilbert on account of the indebtedness of Minister to petitioner, and that in his opinion, based on the evidence, Minister neither paid said sum, nor any other sum, on account of said indebtedness. The Special Term confirmed the report and dismissed the proceeding, with costs, and thereupon "a judgment" was entered that the proceeding be dismissed and Gilbert have judgment against the petitioner for costs.

The reference was but to inform the conscience of the court, and the court could adopt or disregard the report of

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the referee. *Marshall v. Meech*, 51 N. Y. 142, 10 Am. Rep. 572; *Muhlenbrinck v. Pooler*, (Sup.) 40 Hun, 526. The report, however, was entitled to the careful consideration of the court, mindful of the fact that the referee saw and heard the witnesses, with all the advantage that is gained by that personal contact. The delivery of a witness and the record of his delivery are two distinct things, and the hearer of evidence has a great advantage over the reader thereof. The temperament, the manner, and the method of a witness, as well as his words, are valuable indications as to whether he is positive when he should have doubt, or whether he mistakes or misstates, not to say perverts or prevaricates. I do not intend any peculiar application of these words to the witnesses in this case. A reading of the testimony does not convince me that the Special Term erred in adopting the report of the learned referee. The affiants upon the petition were the attorneys of the petitioner and their employés, or the employés of the petitioner. They deposed as to statements by Minister that he had paid the amount of the claim to Gilbert, and to admissions by Gilbert to that effect, and to his promise to settle. The opposing affidavits were made by Gilbert and by Minister. The hearing before the referee consisted in the taking of the evidence of some of the petitioner's affiants and of Gilbert and Minister. The witnesses for the petitioner were Monheimer, a law clerk in the office of the petitioner's attorneys, Lithauer, an associate attorney, and Crain, a traveling salesman of the petitioner.

The case of the petitioner rests upon admissions of Minister and of Gilbert. There is proof that Minister had said that he had paid Gilbert on account of the claim, but there is no direct proof that Gilbert in so many words admitted that he had collected the money from Minister upon that claim. Lithauer does testify that Gilbert, in the presence of Minister, when told of Minister's statement, said to Minister, "Bill, you ought not to have said anything about

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that"; then when Lithauer asked for a check, he replied that he would discuss the matter with the witness; that in such discussion he informed the witness "that he would send Paul Jones & Co. a check for the sum of \$142, which he had collected from Minister, within ten days." Crain testifies that, after the claim had been placed in Gilbert's hands, Gilbert asked Crain to ask the clients "to let up," not to annoy him with letters about the claims, saying, "You know I will pay this all right." Gilbert testifies that when he was asked, in March, 1903, by Lithauer, if Minister had paid him any money on account of the claim, he answered that he had not, and, when Lithauer said that he had understood to the contrary, the witness said that there was a matter of \$142 which he had agreed with Minister to turn over on account of the claim as soon as convenient, which he thought would be within the next 10 days, and that he explained the circumstances, asserting that no money had been paid to him by Minister directly. The alleged admissions are denied by Gilbert and by Minister.

Much of the details as testified to by the plaintiff's witnesses are reconcilable with the version of Gilbert and Minister, namely, that Minister, being asked for money by Gilbert as attorney for the petitioner, requested Gilbert to apply on the claim \$142 then owed by Gilbert to Minister, and that Gilbert said he would do so and did not keep his promise, but that, when Gilbert was proceeded against as for money actually collected, he showed that he did not then owe anything to Minister. Gilbert and Minister, under searching cross-examination, gave the details of the said indebtedness and of its discharge. It was natural enough that Gilbert, while thus indebted, should have acted as if he intended to thus discharge his debt to Minister by payment on his account to the petitioner, and that those with whom he talked jumped at the conclusion that he had actually collected the money. The testimony that Gilbert said that he would send the clients a check for \$142 "which

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he had collected from Minister" may well be the narrative of the witness as descriptive of the money, or as his understanding of the statements of Gilbert. In any event, it is not a clear, distinct statement of an admission by Gilbert. The evidence of Crain that Gilbert said to him, "You know I will pay this all right," is that such saying was after the time the claim was put in Gilbert's hands, but not after the incident in regard to the payment, so that it is entirely consistent with the theory that Gilbert did not wish to be irked by letters of insistence or inquiry, but that he would pay the claim as soon as he collected it.

The appellant insists that the referee erred in a ruling upon the evidence. Gilbert, the attorney, under cross-examination was asked:

"Q. There are other clients of yours, Mr. Gilbert, are there not, who are making claims that you have collected money for which you did not report to them. (Objected to. Objection sustained. Exception.)"

And again he was asked:

"Q. I ask you again, and request you to ask your attorney not to object to the question: Have not other or another application been made by clients of yours to compel the restitution of money collected by you and not turned over to those clients? (Objected to. Objection sustained. Exception.)"

The referee, having been ordered to report the evidence with his opinion, was not bound to take testimony which appeared to him as not relevant to the issue. Rumsey's Practice, 364; Matter of Silvernail, 45 Hun, 575. The rule seems otherwise if he had been ordered to take the testimony only. Fox v. Moyer, 54 N. Y. 125. I think that the learned referee did not err in his ruling. The general rule is that an offense is not proven by proof of another offense, and that such proof is not relevant upon a legal doctrine of probabilities. The principle of the rule obtains in both civil and criminal cases. Wigmore on

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was very clearly explained to the jury in the charge, and they were instructed, if they did not believe the representations to others to be part of a general purpose or scheme to obtain goods fraudulently, to disregard them, and not to consider them as independent acts, or permit them to work a mere prejudice against the accused."

The point that the report of the referee does not state separately the facts found and the conclusions of law, as required by section 1022 of the Code of Civil Procedure, is not well made. The statute makes this requirement where the report of a referee is upon a trial of the whole issues of fact, not otherwise. *Jacobson v. Brooklyn Lumber Co.*, 184 N. Y. 152-158. In *Lederer v. Lederer*, 108 App. Div. 228, 95 N. Y. Supp. 623, cited by the learned counsel for the appellant, the reference was to determine the issues, and in that case it was said:

"The purpose stated and designated is as pointed out in *Jefferson County National Bank v. Dewey*, 181 N. Y. 98, to enable the defeated party to take proper exceptions and to enable the court, in case an appeal be taken, to determine what facts the referee did find and whether they sustained the legal conclusions."

I recommend affirmance, with costs.

Order affirmed, with \$10 costs and disbursements. All concur.

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MAX MARX, APPELLANT, v. CHARLES BROGAN,
RESPONDENT.

NEW YORK COURT OF APPEALS, MAY, 1907.

§ 1279.

Submission of controversy—Construction of section 1279 of Code of Civil Procedure.

A submitted controversy, under section 1279 of the Code of Civil Procedure, must involve questions of law only. If the controversy necessarily involves the drawing of inferences from inconclusive, equivocal or evidentiary facts before a legal conclusion can be formed the court is without jurisdiction to hear it as a submitted controversy.

Submitted controversy must involve questions of law only.

The case, as submitted, involved the question whether the building proposed to be erected would constitute a violation of a covenant against the erection of a tenement house upon the land; that is, whether the proposed structure was a tenement house, or, what is known as a high-class apartment house. It showed, in the drawings, the façade of the building, the plans of its internal arrangement, a description of the materials to be used, a statement of the estimated cost and of the rents expected to be received. It was held that, inasmuch as a decision of the case must depend upon facts from which equivocal or conflicting inferences might be drawn, respecting the essential differences distinguishing one class of structure from the other, the controversy could not be submitted as involving only a question of law.

(Decided May, 1907.)

Appeal from a judgment of the Appellate Division, First Department, unanimously deciding a controversy submitted under section 1279 of the Code of Civil Procedure.

Mr. Charles Strauss, for appellant.

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Messrs. Henry W. Hayden and Albert J. Shaw, for respondent.

WERNER, J.—This appeal comes to this court from a judgment entered upon a decision of the Appellate Division rendered after the hearing of a submitted controversy under section 1279, Code of Civil Procedure. The question decided by that court, which we are asked to review, is whether a building which the defendant proposes to build upon a parcel of land owned by him and located in One Hundred and Forty-eighth street, New York City, is of such a character that its erection will constitute a violation of a covenant designed to prevent the erection of a tenement house upon lands owned by the respective parties. The fate of this appeal depends wholly upon the nature of the issue embraced in the controversy submitted to the learned Appellate Division. If the submitted case presented a pure question of law the Supreme Court had power to decide it, and we are charged with the duty of reviewing the correctness of that decision; but if the question of law could not be decided without first disposing of conflicting or equivocal inferences of fact the court below was without jurisdiction, the judgment herein must be reversed and the proceeding dismissed.

The submission of controversies for judicial decision without litigation is of statutory birth. It seems to have had its origin in this State in the report of the commissioners appointed to revise our practice and procedure under the Constitution of 1846. That report contained a section which the Legislature adopted as part of the Code of Procedure of 1848, in which it was first designated as section 325 and later as section 372. It is now section 1279 of the Code of Civil Procedure.

The portion of the present section which is material to the controversy at bar is substantially identical with the original enactment. It provides that "the parties to a

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question in difference, which might be the subject of an action, being of full age, may agree upon a case containing a statement of the facts upon which the controversy depends, and may present a written submission thereof to a court of record, which would have jurisdiction of an action, brought for the same cause." In reporting the original section as one of the amendments to our procedure the commissioners said: "This provision, it is believed, will be useful in many cases where a question as to a legal right exists between fair and honorable men, there being no dispute about the facts."

The language of the statute, supplanted by the sentence quoted from the report of the commissioners, leaves no doubt as to the nature and scope of the proceeding described in the statute. It was not intended to embrace issues where any dispute of fact was involved, but was to be confined to causes depending wholly upon questions of law. That is the plain and unmistakable import of the words used in the statute. That was clearly the understanding of the commissioners who reported this amendment to our law of procedure, and that has been the view entertained by our courts since it has been a part of the two Codes referred to (*Neilson v. Com. Mut. Ins. Co.*, 3 Duer, 455; *Clark v. Wise*, 46 N. Y., 612; *Fearing v. Irwin*, 55 id., 486). It seems obvious, therefore, that whenever it clearly appears that a submitted controversy necessarily involves the duty of drawing inferences from inconclusive, equivocal or evidentiary facts before a legal conclusion can be formed, it follows as a logical sequence that the issue is one which must be presented and decided in an action, and not in this statutory proceeding. This view is strongly reinforced by the decisions of other States where our statute has served as a model. While it cannot be said that these foreign decisions are absolutely uniform as to the jurisdictional powers of the courts in such proceedings, it may safely be affirmed that under statutes like ours there has been no substantial

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deviation from the view that the courts have no power to draw inferences of fact as distinguished from inferences of law (*Goodrich v. City of Detroit*, 12 Mich., 279; *Powers v. Providence Inst. for Sav.*, 122 Mass., 443; *Pray v. Burbank*, 11 N. H., 290; *Burr v. Des Moines*, 1 Wall., 99, 102; 1 *Ency. Pl. & Pr.*, 393; *Mayhew v. Durfee*, 138 Mass., 548; *Hysinger v. Baltzell*, 3 Gill & J., 159; *Vansant v. Roberts*, 3 Md., 119; *Sawyer v. Corse*, 17 Gratt., Va., 230). In Massachusetts and Maryland, under statutes which in their essential features are identical with our own, and in cases directly involving the question, the courts have laid down what we regard as the correct rule. In *Mayhew v. Durfee* (*supra*) the Supreme Judicial Court of Massachusetts states it as follows: "When an action at law is submitted upon agreed facts either to the Superior Court or to this court, only questions of law are submitted, and neither court can draw inferences of fact from the facts agreed, unless, as matter of law, they are necessary inferences." In Maryland, in the case of *Hysinger v. Baltzell* (*supra*), the rule is stated to be that the court can "make no inferences unless they be of law or are such as are clear, undeniable deductions from the statements agreed on. It is competent for the jury to draw inferences from testimony submitted to them, but that power is not extended to the court when required to act on a case stated where nothing can be supplied by implication."

In the light of the history of our statute and the decisions which bear upon its scope and meaning, a short review of the facts submitted in the controversy at bar will disclose that they are not of such a conclusive character as to obviate or exclude the necessity of drawing inferences of fact essential to a complete determination of the controversy. On the contrary, the facts submitted are purely evidentiary in their nature, leaving the essential, decisive or ultimate fact to be decided by the court. As will be seen by reference to the record, the facts agreed upon are merely

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descriptive. They disclose the dimensions of the building which the defendant desires to erect; its external appearance; its internal arrangements; the materials of which it is to be composed, and the estimated cost of the whole, with the rentals expected to be realized. Before a court can determine whether the proposed building would be in contravention of the terms of the covenant against the erection of a tenement house, it must first be decided whether this building as thus described is an apartment house within the definition of that term recently approved by this court in *Kitching v. Brown* (180 N. Y., 414). It needs no argument to show that there may be cases in which the description of a building proposed to be erected so clearly fixes and discloses its real character that its status can be decided as a matter of law. On the other hand, it is equally plain that there may be other cases in which a description, although involving no dispute of the evidentiary facts submitted, may give rise to conflicting or equivocal inferences as to other facts which must be decided before the real character of the structure can be determined. The case at bar affords a fair illustration of the latter class. The drawing which shows the facade of the building, the plans setting forth its internal arrangement, the description of the materials of which it is to be constructed, the statement of the estimated cost of the whole, and of the rents expected to be derived therefrom are all calculated to raise the question whether this building is to be a cheap apartment house or a superior tenement house. The decision of this question depends upon a practical knowledge of the present housing conditions in New York City and of the essential differences which distinguish one class of structures from another. This question cannot be decided merely by reference to the name which the intending builder gives the proposed structure, but must be determined in view of its real character as disclosed by its cost, the precise character of its construction, the quality of

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the materials used, its location, the scale of rentals to be charged and the class of tenants by whom it is to be occupied. If, in a doubtful case, these elements can be determined as questions of law, then the mere arbitrary characterization by the courts of a described structure may place it in one category or the other without regard to its real character and in disregard of the relation which it may bear to well defined classes of building or to the locality in which it is placed. The mere statement of the proposition seems to us sufficient to indicate that what is fundamentally involved in this case is not a question of law at all, but essentially a question fact.

It is suggested that this decision will tend to discourage the laudable efforts of disputants to submit their differences for decision without the expense and delay incident to litigation. We do not think so. It is farthest from our intention or desire to impair in the slightest degree the usefulness of this summary manner of settling legal disputes. It seems thus far to have afforded to parties an inexpensive and expeditious method of securing the judgments of the courts without the delay and circumstance inseparable from regular actions, and has amply vindicated the wisdom of the commissioners upon whose report it was inaugurated. We are promulgating no new rule of law as to this proceeding, but are simply following the authorities which define its scope and its limitations as clearly indicated in the statute. When the ultimate as well as the evidentiary facts upon which a legal conclusion depends are all agreed upon and properly submitted, a case falls within the purview of section 1279 of the Code of Civil Procedure. But when the facts agreed upon and submitted give rise to other inferences of fact which may be conflicting, then resort must be had to an action for the adjudication of the matters in difference.

We think there is nothing in the foregoing views which conflicts with our decision in *Kitching v. Brown* (180 N.

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Y., 414). That was an action tried before the court without a jury, and all questions of fact were disposed of before it reached the Appellate Division. The effect of the decision of the trial court in that case was to determine that the building over which the controversy arose was an apartment house and not a tenement house. As there was evidence to sustain the finding of fact there made, its affirmance by the Appellate Division, although by a divided court, settled that question in this court. The legal question which this court decided in that case was that a covenant against the erection of a tenement house was not intended to prohibit the building of an apartment house as that designation is now defined and understood.

The judgment appealed from should be reversed and the proceeding dismissed, without prejudice to any action, without costs to either party.

HAIGHT, J. (dissenting).—I am unable to concur in the conclusion reached by my associates. To my mind it seriously impairs one of the most valuable remedies given by the Code, that of permitting parties to submit their controversies upon facts agreed upon. If the facts in this case are not such as can be submitted to the court for its determination of the rights of the parties, I apprehend that the legal profession in the future will find it difficult to determine the facts and cases that may be submitted.

The rule, as I understood it, is that the facts agreed upon should be such that conflicting inferences of fact may not be drawn therefrom, and that they should be sufficiently or so fully stated as to enable the court to award judgment thereon.

The defendant is the owner of a tract of land on One Hundred and Forty-eighth street in the City of New York, upon which there is a covenant against the erection of a tenement house. He has planned to erect thereon a building which he claims to be an apartment house. The

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plaintiff seeks to enjoin him from the construction of the building, upon the ground that the building would be a tenement house, and, therefore, prohibited by the covenant. The only question, therefore, in controversy is as to whether the proposed structure would constitute a tenement or an apartment house. For the purpose of having this controversy determined, they have agreed upon all of the facts pertaining to the proposed structure, together with the character of the buildings existing upon that block and of the surrounding territory. The building is to be one hundred feet in width at its front on One Hundred and Forty-eighth street, eighty-seven feet in width in the rear, and eighty-one feet in depth. It is to be six stories high, constructed of brick and stone, with tile floors for the main hall, marble wainscoting, divided into apartments which contain a private hall, parlor, diningroom, kitchen, bedroom, servants' room, private bathroom and closet; each apartment to be finished with hardwood, heated by steam, equipped for lighting by electricity and gas, provided with hot and cold water, open-work plumbing, gas ranges for cooking, a dumbwaiter and a long-distance telephone. The building is to have an electric elevator, is to cost \$125,000, and the apartments are expected to rent for about \$11 per room per month, making from \$55 to \$66 per month for an apartment; detailed plans of the proposed building are given, and also an architect's picture of the front elevation as the building will appear when completed. Other details of the work are embraced in the statement of facts which need not now be stated. It is not suggested that any essential fact has been omitted from the agreement, or that could be proved upon a trial that would further aid the court in determining the question upon which the parties differ. It is contended, however, that all of the facts submitted are purely evidentiary in their nature, leaving the essential, decisive or ultimate fact as to whether the structure would constitute a tenement or an apartment house undisposed of. If they had been able to

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agree upon that question there would have been no controversy to submit to the court. If a person goes to a grocery store and buys a quantity of tea for \$2, sugar for \$3, and flour for \$5, I presume the three purchases would be evidentiary facts upon the question as to the amount that would be owing the groceryman. But with the times of the three purchases agreed upon, I apprehend no court would hesitate about ordering judgment for the amount due.

In the case of *Kitching v. Brown* (180 N. Y., 414) we have recently defined tenement houses and apartment houses, showing the distinction between the two classes of structures. The question at issue between the parties has to be determined from the character of the proposed structure, the material used, its cost, appearance, its appointments and uses, all of which are covered by the facts agreed upon and from which the court is asked to determine from those facts whether the proposed structure is brought within the definition constituting that of an apartment or a tenement house. This, I think, is a conclusion of law drawn from the facts agreed upon. Suppose the plaintiff had brought an action to enjoin the defendant from constructing the building, and in his complaint had set forth the identical facts agreed upon from which he claimed that the structure would constitute a tenement house, and that the defendant had demurred thereto, contending that upon the facts stated the structure would be an apartment house and that, therefore, the complaint did not state a cause of action. Could it then be contended that a question of law would not be presented for the determination of the court? Again, supposing the action had been brought to trial, and thereupon, by stipulation of the parties, the facts as here agreed upon had been read as the evidence in the case, would there have been any question to submit to the jury? I think not.

It is further contended that the facts agreed upon are not only merely evidentiary, but that they are also such that

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conflicting inferences of fact may be drawn therefrom. If so, my associates are correct in the conclusions which they have reached. But what conflicting inference is there that can be drawn from these facts? My attention has been called to none. Stone is stone, marble marble, and brick brick. I am not aware that any conflicting inference can be drawn from the fact that the building is to be constructed out of these materials, nor am I able to discover any of the other facts stated which are open to change or modification by inferences of fact which may be drawn therefrom. This is not a case involving the intent of a person which may only be determined from inferences drawn from his acts, conduct and expression. It is a case in which the submission consists of the facts stated, which mean what they state and nothing more, which to my mind are not subject to change by conflicting inferences.

I therefore am of the opinion that the question submitted ought to be determined upon its merits.

CULLEN, Ch.J.; GRAY, EDWARD T. BARTLETT, WILLARD BARTLETT and HISCOCK, JJ., concur with WERNER, J.; HAIGHT, J., reads dissenting opinion.

Judgment reversed, &c.

Williams v. Fire Ass'n of Philadelphia.

JOHN R. WILLIAMS v. FIRE ASS'N OF PHILADELPHIA.

SUPREME COURT, APPELLATE DIVISION, FOURTH DEPARTMENT, MAY, 1907.

§§ 414, 533.

Insurance—Limitation—Condition precedent—Evidence.

The parties to a contract of insurance may stipulate for less than six years in which a civil action may be entered into, under section 414, subd. 1, of the Code of Civil Procedure.

Pleading—Performance of condition precedent.

A condition precedent under the authority of section 533 of the Code of Civil Procedure, may be alleged as having been "duly performed," but when controverted must be proved on the trial, and such allegation of performance cannot be successfully controverted by showing a waiver of performance.

(Decided May, 1907.)

Appeal from Special Term, Erie County.

From a judgment for defendant, plaintiff appeals. Reversed, and new trial granted.

Mr. Eugene M. Bartlett, for appellant.

Mr. J. H. Metcalf, for respondent.

SPRING, J.—A statement of the facts is contained in the opinion of the Presiding Justice. The policy of insurance contains this provision:

"No suit or action on this policy for the recovery of any claim shall be sustainable in any court of law or equity until after full compliance by the insured with all the fore-

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going requirements, nor unless commenced within 12 months next after the fire."

By this clause in their contract the parties made compliance with the requirements in the policy and the commencement of the action within 12 months after the fire conditions precedent to the maintenance of the action. *Clemens v. American Fire Insurance Co.*, 70 App. Div. 435, 75 N. Y. Supp. 484; *Ketchum v. Belding*, 58 App. Div. 295, 68 N. Y. Supp. 1099; *Meres v. Emmons*, 103 App. Div. 381-384, 92 N. Y. Supp. 1099; *Reining et al. v. City of Buffalo*, 102 N. Y. 308, 4 Encyc. of Pl. & Prac., p. 641; 2 May on Insurance (4th Ed.), p. 1373. And their performance must be alleged in the complaint. Cases cited; *Thrall v. Cuba Village*, 88 App. Div. 410, 84 N. Y. Supp. 661; *Rosenstock v. City of N. Y.*, 97 App. Div. 337, 89 N. Y. Supp. 948; *Bogardus v. N. Y. Life Ins. Co.*, 101 N. Y. 328-334.

In *Clemens v. American Fire Insurance Company*, *supra*, in construing the provision in the insurance contract providing that 60 days must elapse after proofs of loss have been furnished before an action on the policy can be commenced, this court held unanimously that such requirement was a condition precedent to sustain the action and must be alleged in the complaint. May, in his work on Insurance (volume 2, p. 1373, 4th Ed.), states the rule as follows:

"The petition must always aver the lapse of the time necessary before action can be brought—the 60 days after proof, or other time allowed for payment."

The Encyclopedia of Pleading & Practice (volume 4, p. 641) contains the following:

"So, in an action upon an insurance policy providing that a loss shall not be payable until a certain time after notice and proof of the same, the complaint must show that the action was not commenced until the lapse of the specified time after the notice and proofs were furnished"—citing many authorities in support of the proposition.

Unquestionably the plea of the statute of limitations and

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the statute of frauds is ordinarily a defense. The parties to a contract, however, may prescribe that the performance of any requirement is a prerequisite to a recovery, and in that event due performance must be alleged in the complaint, or adequate excuse for failure be averred. The time when an action is to be brought may as well be regulated by the parties as any other condition contained in their agreement. Code Civ. Pro., section 414, subd. 1. In order to obviate the necessity of alleging in detail the facts constituting performance of the conditions precedent embodied in the contract, the pleader is permitted by section 533 of the Code of Civil Procedure to state he has "duly performed" these requirements; but, "if that allegation is controverted, he must on the trial, establish performance."

The complaint in the present action contained this Code allegation, and the answer set out a general denial and alleged affirmatively that the action was not commenced within the time stipulated in the contract. On the trial the plaintiff did not attempt to show that the action was commenced within one year after the fire. Concedely it was not commenced within that time. He proved facts, under the objection of the defendant, tending to excuse his failure for commencing the action within the prescribed period. He must establish that he "duly performed" all the conditions imposed upon him conformably to the allegation in his complaint. He did not meet this burden by showing waiver of performance. *Beecher v. Schuback*, 1 App. Div. 359, 37 N. Y. Supp. 325, affirmed on opinion below 158 N. Y. 687, *Burr v. Union Surety & Guar. Co.*, 86 App. Div. 545, 83 N. Y. Supp. 756; *Brandt v. City of N. Y.*, 110 App. Div. 396-399, 97 N. Y. Supp. 280; *Stern v. McKee*, 70 App. Div. 142-146, 75 N. Y. Supp. 157; *Ryer v. Prud. Ins. Co.*, 85 App. Div. 7, 82 N. Y. Supp. 971. If the plaintiff expected to show a waiver of performance by the insured, he must plead it. *Elting v. Dayton*, 17 N. Y. Supp. 849, 63 Hun, 629, affirmed 144 N. Y. 644; *Fox v. Davidson*,

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36 App. Div. 159, 55 N. Y. Supp. 524; *Allen v. Duch. Co. Mut. Ins. Co.*, 95 App. Div. 86, 88 N. Y. Supp. 530; *Todd v. Union Gas. & Sur. Co.*, 70 App. Div. 52, 74 N. Y. Supp. 1062. He could not allege due performance with the provisions of the policy, and, when this is denied, change front on the trial, conceding his averment is untrue, and establish facts excusing the performance. If the plaintiff relies upon a waiver, he should apprise the defendant in his complaint of his position. *Porter v. Kingsbury*, 5 Hun, 597, affirmed 71 N. Y. 588.

It is urged that the plaintiff could not anticipate that the defendant would insist upon the statute of limitations, and, consequently, he was not obliged to allege any excuse for full performance. That might be stated with equal propriety as to any other requirement in the insurance contract which is made a condition precedent, for the defendant assuredly may waive any of these provisions. If, however, they are preliminaries essential to the maintenance of the action, the plaintiff must in his complaint allege either due performance or facts excusing it, and the time limitation in the policy is within this rule of pleading, as well as any other condition. The defendant did not set up the pendency of the arbitration proceeding as a defense. It preferred to stand on the issue of performance. The defendant was not required to interpose the other defense, when it was satisfied that no recovery could be had on the pleadings as they were framed.

The trial judge received the evidence of waiver and granted the motion for nonsuit on the ground that the arbitration agreement was still effective. That issue was certainly not raised by the pleadings. The evidence, in my judgment, was sufficient to permit the jury to find that the arbitration proceedings had been abandoned. Had the court excluded the evidence of the waiver, an amendment to the complaint might have been allowed, and the case eventually been disposed of on the merits. I am therefore in

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favor of a reversal, so that the issues may be properly set forth in the pleadings, and a trial had on the substantial issues.

Judgment reversed, and new trial granted, with costs to appellant to abide event.

WILLIAMS and ROBSON, JJ., concur.

MCLENNAN, P. J.—The action was commenced on the 20th day of January, 1905, to recover upon what is known as a "use and occupancy policy"—an insurance or indemnity against loss from being unable to occupy or use the insured property by reason of a fire, not exceeding \$15 per day for 150 working days, which was issued and delivered to plaintiff's assignor by the defendant.

Practically the only questions presented by this appeal arise upon the pleadings. The complaint is in the form usual in such cases. It is alleged in substance that on the 19th day of October, 1899, the defendant issued its policy of insurance dated and delivered on that day to plaintiff's assignor, and thereby insured such assignor in the sum of \$2,250 against loss of use and occupancy of its factory premises, situate in the city of Utica, N. Y., and of the machinery therein contained, if the same should be disabled by fire during the term of, and under the conditions specified in, said policy; that by reason of a fire so occurring on the 9th day of October, 1900, the loss which is the subject of this controversy was sustained; and that the insured prepared and served upon the defendant proper proofs of loss, as required by, and within the time specified in, the policy. And it is further alleged in the complaint that plaintiff's assignor complied with all the conditions of said policy which he was thereby required to perform to entitle him to recover the amount of loss sustained; that upon demand duly made the defendant refused to pay such loss or any part thereof, and thereupon judgment was

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demanded for the amount of the same. The policy in question was annexed to and made a part of the complaint and one of the provisions of such policy was as follows:

"No suit or action on this policy for the recovery of any claim shall be sustainable in any court of law or equity until after full compliance by the insured with all the foregoing requirements, nor unless commenced within 12 months next after the fire."

Concededly this action was not commenced until long after the expiration of said 12 months. The complaint, however, states a good and perfect cause of action against the defendant, unless because of the fact that it appears on the face thereof that such action was not brought within 12 months after the fire occurred, as required by the express provisions of the policy. Such fact, although appearing upon the face of the complaint, did not render it demurrable, because it only constituted a defense if pleaded as such. The statute of limitations is an affirmative defense, and, if relied upon, must be asserted by the defendant, and must always be specially pleaded in actions at law, and can never be availed of otherwise than by special plea. The case of *Crane v. Powell*, 139 N. Y. 379, 34 N. E. 911, presented the question as to whether or not the statute of frauds must be pleaded, in order to be available to the defendant as a defense, and it was held that such defense must be pleaded in order to be so available. It was said by Judge O'Brien who wrote the opinion of the court (page 388 of 139 N. Y.):

"The statute of frauds is a shield, which a party may use or not for his protection, just as he may use the statute of limitations, the statute against usury, that against betting and gaming, and others that might be mentioned. I take it to be a general rule of universal application that the statutes last mentioned are not available to a party unless specifically pleaded, and there is no reason for making the statute of frauds an exception to the rule."

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The true rule is also stated in general language in *Fischer v. Metropolitan Life Ins. Co.*, 37 App. Div. 575, 579, 56 N. Y. Supp. 260, 263, as follows:

"Under the Code of Procedure, it has been settled for many years that whenever it is necessary for the defendant, by way of defense, to show any fact which, starting with the proposition that there has been a valid contract between parties, operates to defend a claim under it by establishing a subsequent performance or a subsequent forfeiture of it, such performance or forfeiture is an affirmative defense, and must be affirmatively set out before it can be proved."

The defendant in the case at bar fully recognized the correctness of the rule adverted to, and specifically pleaded in its answer that plaintiff's action was barred, because not brought within 12 months after the fire occurred, as required by the express terms of the policy. But, if the complaint was sufficient before the interposition of such defense, did such plea by the defendant render it bad? Or was it incumbent upon the plaintiff to have anticipated that the defendant would plead the time limit, which was entirely optional with it, and because of such anticipated defense to have stated in his original complaint facts showing that such time limit had been waived? We think there is no rule of pleading which imposes such obligation upon the plaintiff; that a plaintiff is not required to allege in his complaint facts showing a waiver of a defense, which may or may not be insisted upon by a defendant, and which, if not specifically pleaded, is waived.

Assuming, then, that the complaint states a good cause of action against the defendant, and it being conceded that the defendant specifically pleaded that the action was barred because not commenced within 12 months after the fire occurred, as required by the policy, what are the rights of the parties under such pleading? Without doubt, at some stage of the litigation the plaintiff was entitled to show that the time limited for the commencement of the action as

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specified in the policy had been waived by the defendant. A good cause of action having been stated in the complaint originally served, and by the answer thereto practically the statute of limitations having been pleaded by the defendant, was it necessary for the plaintiff to serve a supplemental complaint or a reply in order to prove facts constituting a waiver of the limitation? There is no rule, so far as we have been able to discover, which requires such action on the part of the plaintiff. Under the Code of Civil Procedure a reply is required only where new matter is set up as a defense in the answer.

The precise question now being considered may be illustrated by a case common in the experience of every lawyer: A. brings an action upon a promissory note made by B. It appears upon the face of the complaint that more than six years have elapsed since the note became due and payable, and that the whole amount thereof, principal and interest, is due and unpaid, for which amount judgment is demanded. Such complaint states a good cause of action, notwithstanding it appears upon the face thereof that it is subject to the defense, if pleaded, that the note is "outlawed." The defendant pleads such defense. May not the plaintiff in such case, without any change in the pleadings, prove upon the trial of such action that the statute of limitations had been waived by the defendant? No amendment of the complaint is necessary in order to entitle the plaintiff to make proof of such waiver.

So, in the case at bar, the plaintiff, upon his complaint and under the answer interposed by the defendant, was entitled to show that the defense that the action had not been brought within the time specified in the policy had been waived by the defendant. In this case the defendant interposed a general denial; also pleaded that the action was barred because not commenced within the time limit specified in the policy; also that the plaintiff's assignor kept kerosene or gasoline upon the premises in violation of

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the express terms of the policy; and, further, that the plaintiff had not used proper means to restore the property to its former state of usefulness as soon as required under the terms of the policy. The issues raised by the last two defenses were not tried, and it is not claimed by the respondent that the judgment of nonsuit can be sustained upon the ground that it was shown that such provisions of the contract had been violated. The parties, so far as it is important to note, went to trial upon the issues raised by the pleadings, eliminating the two last-mentioned defenses. The complaint, so far as we need consider, alleged the issuance of the policy, that while it was in force a fire occurred, which resulted in loss, and for which under its conditions the defendant was liable; the plaintiff having complied with all precedent conditions. The only answer interposed, so far as important to consider upon this appeal, was that the action was not commenced within 12 months after the fire occurred. Upon such pleadings the plaintiff was entitled to prove any facts tending to show that such time limit had been waived by the defendant, and so without alleging in his original complaint such facts on the assumption that such defense would be interposed, or without serving a supplemental complaint or reply setting up such facts after the interposition of such defense. The authorities to which attention has been called are not in conflict with this proposition. In the case of *Fox v. Davidson*, 36 App. Div. 159, 55 N. Y. Supp. 524, it was held that:

"When a complaint alleges performance of a contract, the plaintiff may not, without amendment of his pleading, recover by proving that a breach on his part was either waived or justified by the defendant's conduct, unless the latter, by not objecting, consents to such a recovery."

In that case it appeared that the defendant put in issue by general denial the plaintiff's right to recover. No rule could be invoked against the defendant in that case that he

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waived the nonperformance of the contract by not specifically pleading such defense, as it has been held, in case the statute of limitations is not specifically pleaded, such defense is waived, and therefore in that case it was held, as stated in the headnote above quoted.

In the case of *Allen v. Dutchess County Life Ins. Co.*, 95 App. Div. 86, 88 N. Y. Supp. 530, it was held that:

"Where, in an action upon the policy, the plaintiff pleads a waiver of the provisions of the policy regulating and filing of the proof of loss and certain procedure thereupon, and alleges performance of 'all the other conditions in said policy of insurance on his part,' he is not entitled to prove a waiver of the limitation clause contained in the policy."

In other words, in that case the plaintiff sought to prove under its complaint, which alleged facts tending to show a waiver of the provisions of the policy regulating the filing of proof of loss, that the defendant had waived the 12-month limitation for the commencement of the action, specified in the policy. No suggestion is made in that case to the effect that if the plaintiff had stood squarely upon the provisions of the policy, and the defendant had denied its liability because of failure to commence the action within 12 months, the plaintiff could not have given proof of any facts tending to show that such limitation had been waived.

The case of *Todd v. Union Casualty & Surety Co.*, 70 App. Div. 52, 74 N. Y. Supp. 1062, we think, has no application to the question here involved. In that case it was simply held:

"That the complaint was demurrable, as it alleged simply that the defendant insured the plaintiff upon certain terms and conditions which were not specified, against certain hazards which were not set forth, and that the plaintiff had performed in so far as performance had not been waived—setting forth no facts from which a waiver could be presumed."

We think no case can be found in which it has been held

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or even suggested that it is incumbent upon a plaintiff, who brings suit to enforce a cause of action which upon the face of the complaint appears to be "outlawed," to allege facts which will show that the statute of limitations has been waived, upon the assumption that the defendant will plead such statute as a defense, or, when such statute is pleaded, that it is incumbent upon the plaintiff to serve a supplemental complaint or reply setting up facts constituting such waiver in order to entitle him to prove the same. We conclude that under the complaint and answer it was entirely competent for the plaintiff in this case to prove any facts tending to show that the time limit in the policy within which an action could be brought to enforce the same had been waived.

In the case at bar the plaintiff sought to accomplish this result by proving that, shortly after the fire occurred, the parties entered into an arbitration agreement looking to the settlement of the loss, and that such agreement continued in force until shortly before the commencement of this action, when the defendant repudiated the same and refused to proceed further thereunder, and that after such repudiation and refusal this action was brought. The fact that such arbitration agreement had been entered into is not disputed, and we think that the evidence offered by the plaintiff as to defendant's repudiation and failure to proceed thereunder was such as to make a question of fact for the jury, and such as, if found favorably to the plaintiff, would have constituted a waiver by the defendant of the time limit specified in the policy within which an action must be brought.

In the case of *Williams v. German Ins. Co.*, 90 App. Div. 415, 86 N. Y. Supp. 98, an action brought upon a like policy to recover for the same loss, this court held that, while the arbitration agreement was in force and the proceedings thereunder were pending, no action could be maintained upon the policy, and that the time within which

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such action could be brought, as specified in the policy, did not run during the pendency of such proceedings. In this case, as we have seen, there was proof given tending to show that the proceedings under the arbitration agreement were continued until shortly before the commencement of this action, and that then the defendant repudiated the same, refused to proceed further, and wholly abandoned such proceedings. The learned trial judge seemed to think, and held, that, it being shown by the plaintiff that such arbitration agreement had been entered into and not formally terminated, that fact constituted a bar to the maintenance of this action. We think that such defense, in order to be available to the defendant, should have been pleaded, precisely the same as the statute of limitations, the statute of frauds, and like defences are required to be pleaded.

But in this case, as we have seen, the pendency of the proceedings under the arbitration agreement was proven by the plaintiff only for the purpose of showing that the time limit specified in the contract did not run during such pendency, and that the same immediately prior to the commencement of this action had been repudiated and abandoned by the defendant, and therefore that it was entirely competent for the plaintiff to bring this action to enforce the contract which his assignor had entered into.

To recapitulate: We conclude that upon the complaint and the answer of the defendant, setting up as a defense the time limit specified in the policy within which an action could be brought, the plaintiff had a right, without any additional allegation or amendment to his complaint, and without reply, to prove any facts tending to show that the defendant had waived such time limit; that the plaintiff having given proof that an arbitration agreement had been entered into, that the proceedings thereunder had been continued until shortly before the commencement of this action, and were then repudiated and abandoned by the defendant, such evidence presented an issue of fact for the

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jury as to whether the time limit specified in the contract had not been waived by the defendant, which, if found favorably to the plaintiff, entitled him to recover so far as that issue was concerned; also that if the defendant wished to raise the question that the action was not maintainable because of the arbitration agreement, and because the proceedings thereunder had not been terminated, such defense should have been raised by answer. In this case there was no motion made by either party to amend the pleadings or to make the same conform to the proof. It is concluded that the nonsuit was wrong, and that a new trial should be granted, with costs to the appellant to abide event.

Judgment and order reversed, and new trial granted, with costs to appellant to abide event.

KRUSE, J. (concurring).—I agree with the Presiding Justice that it was necessary for the defendant to raise by answer the objection that the action was not commenced within the time limited by the terms of the policy, as was done by the defendant. Code Civ. Pro., section 413; *Hamilton v. Royal Insurance Company*, 156 N. Y. 327; *Bannister v. Michigan Mutual Life Insurance Company*, 111 App. Div. 765, 97 N. Y. Supp. 843.

2. While, ordinarily, the defendant insurance company could not avail itself of the defense that the arbitration was pending at the time of the commencement of the action, without pleading that defense affirmatively, yet if the plaintiff, for the purpose of avoiding the effect of the failure upon his part to commence the action within 12 months after the fire, as provided by the policy, proved in rebuttal the pendency of the arbitration proceedings without showing that they had been abandoned or terminated, I think the insurance company could avail itself of that fact without specially pleading it, just as a defendant can avail himself of a payment proven by the plaintiff for the purpose of

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recovering upon a debt which otherwise would be barred by the statute of limitations.

I think the trial judge would have been right in nonsuiting, regardless of the pleadings, had the facts proven by the plaintiff warranted the conclusion, as a matter of law, that the arbitration proceedings were pending at the time of the commencement of the action, but I do not take the view that the evidence conclusively established the pendency of the arbitration proceedings, and I therefore concur in reversing the judgment and granting a new trial.

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**SUPREME COURT, SPECIAL TERM, FULTON COUNTY,
APRIL, 1907.**

§ 1919.***Elections—County Committee—Can be sued—Statutory regulation.***

A county committee of a political party can be sued under the authority of section 1919 of the Code of Civil Procedure as a voluntary association, regardless of the form of membership, its rules, constitution or by-laws.

(Decided April, 1907.)

Action against John A. Cole, as a Republican elector of Fulton County. On return of an order to show cause why an injunction should not be continued *pendente lite*. Injunction continued.

Mr. Dewitt C. Moore, for plaintiff.

Mr. Andrew J. Nellis, for defendant.

SPENCER, J.—This action is brought by the plaintiff, as

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a Republican elector of Fulton County, in behalf of himself and all other Republican electors in the county, to obtain the judgment or order of this court restraining the defendant, as chairman of the Republican county committee, and said committee, its agents, servants, and appointees, from carrying into execution a system of enrollment formulated by said committee, by which all persons are to be excluded from participation in Republican primaries in the county except those whose names appear upon said enrollment. An injunction was issued, and thereafter modified *ex parte*, and this is the return of an order to show cause why it should not be made permanent as so modified. The questions involved in this motion are of great public importance. In order to correctly decide them, it will be necessary to take a brief view of the history of our statutory laws concerning the political rights of citizens and the jurisdiction of the courts to adjudicate thereon.

1. The plaintiff in the case at bar sought the injunction, and it was granted by the court, for the sole purpose of preventing alleged illegal action in the affairs of a political party and the protection of the plaintiff's political rights therein. Interference by injunction is among the highest prerogatives of a court of justice. Its exercise lies in the discretion of the court, and is only employed in the preventive form in order to stay a threatened or non-existent injury. The status quo is thereby maintained until a final hearing and decision may be had. Hitherto the exercise of this power has been confined to the protection of civil rights, as distinguished from those which are political. 22 Cyc. 740, 757. It must be conceded that there are many decisions to the effect that the powers of the court may not be invoked to protect the political rights of a citizen, or to restrain, direct or control the methods of a political party, and therefore the injunction so granted must be vacated unless justification therefor may be found in recent enactments of the Legislature.

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In the common law no place was found for the political rights of citizens. The nearest approach thereto was the ancient writ of quo warranto, which was employed on occasion to adjudicate between adverse claimants to public office. But the writ did not move in the interest of either claimant, but only on behalf of the king to prevent the unlawful usurpation of a public franchise. The same was true of political parties and the conduct of elections. They were only regarded as matters of concern between the citizen and the king, and, the king being supreme and the courts his creatures, their doors were not open for such adjudications. These views of the political rights of citizens became a part of the common law in this country. In like manner other systems and institutions, which had grown up under monarchical forms of government, found a place in our system of jurisprudence, and some still remain in whole or in part to incumber our courts and hamper the administration of justice. Among these may be mentioned the grand jury system, which still survives, although in a modified form, and the common-law doctrine of the property rights of married women, which, after a prolonged struggle between courts and Legislatures, has been practically abolished.

The necessity for a different rule regarding the nonrecognition of the political rights of citizens did not become apparent for many years after the formation of our government, and the ancient doctrine found expression in numerous decisions of our courts. The reasons therefor were not those which originated the doctrine, but were found in the fact that such rights were regarded as belonging to matters which did not concern the public at large, and from their very nature beyond the pale of the law. Political parties differ from individuals, corporations, and chartered organizations, in that they are not liable to amercement, incarceration, or dissolution and therefore not subject to the familiar methods of governmental restraint. For many

years statecraft was at a loss to discover any method by which they might be brought under effectual control. Without liability or responsibility, and suffered to act without restraint, it is no wonder that in their efforts to control elections they often resorted to fraud, force, chicanery, and bribery. It is needless to refer to the mournful history of politics to demonstrate the importance of some method by which they should be restrained and their use of improper influences prevented. The struggle to accomplish this result has left its marks upon the statute books of this state for the last 50 years, where the history of its progress may be read by anyone desiring enlightenment upon the subject. A hasty review is all that is necessary for our present purpose.

What may be regarded as the first serious effort was the passage of the law of 1859, requiring the registration of voters at public elections. Chapter 380, p. 895, Laws of 1859. This statute was aimed at a flagrant political evil known as "repeating and colonization," but did not accomplish its full purpose until 1882, when by an amendment to the Penal Code illegal voting at party primaries was made a crime. Chapter 154, p. 188, Laws of 1882. This was, I believe, the first recognition by law in this state of the existence of political parties, and that crime might be committed in relation to their affairs. But frauds in elections in various forms still continued, and the necessity for a secret ballot, in order to discourage, and if possible prevent, the use of money in the corruption of voters, led to the enactment of the law of 1890, which required the use of official ballots, furnished by public officials at public expense, and requiring their exclusive use at elections. Chapter 262, p. 482, Laws of 1890. The results of this enactment were manifold, but its most important element lay in the fact that it necessitated the regulation of the internal affairs of political parties in order to secure legal certificates of nominations of candidates for

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office. It may well be regarded as the most important and valuable of all our legislation upon this subject. Its indirect results have, however, been of more consequence than those which it was intended to accomplish.

Among the most important of these statutory provisions is the one which relates to the qualification of voters at party primaries. Election Law, Laws 1896, p. 922, c. 909, section 53. The statute provides that no person shall be entitled to vote at any primary, unless he be qualified to vote for the officers to be nominated thereat on the day of election and shall possess such qualifications as shall be authorized by the regulations and usages of the political party or independent body holding the same. The statute also prescribes the duties of the respective officers of the primaries and regulates the method of procedure and the manner of voting. The objects of these provisions are manifest, and it is not to be presumed that the Legislature would so attempt to regulate and prescribe, in respect to the holding of primaries and the qualifications of voters thereat, without intending to enable one having an interest in such primaries to protect and defend his rights and enforce compliance with the law. Otherwise the statute would be inane and an elector powerless. In addition to the foregoing, the Legislature has, in respect to cities of the first and second classes, imposed upon political parties therein a system of enrollment of the members of each party and limited the voters of primaries to the persons whose names appear so enrolled. The Legislature has also provided that this system of enrollment may be used in cities of the third class and villages upon the concurrent vote of the general committees of the respective parties therein. Reference is here made to the enrollment laws for the purpose of indicating the completeness of the legislation of recent years touching the rights of electors, the regulation of political parties, and the duty and jurisdiction of courts to take cognizance thereof. From this

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review of such legislation, I conclude that the old doctrine that political rights were beyond the domain of judicial investigation and determination has been swept away, that there no longer remains any distinction between the civil and political rights of citizens, and that the courts may not shut their doors against the enforcement of any such rights. It will be presumed that every right, recognized or conferred by statute, may be protected, defended, and enforced by an appropriate legal method and that every wrong has its remedy.

2. The statute law, having thus in great measure recognized and prescribed the political rights of citizens, it was not necessary to confer jurisdiction by special enactments upon the courts to administer justice in respect thereto. It is true special provisions have been made in relation to special and particular matters, but the general jurisdiction of the Supreme Court to take cognizance of all the legal rights of persons cannot be doubted. As early as 1849 the Legislature provided for the bringing of suits by and against unincorporated associations (chapter 258, p. 389, Laws 1849; chapter 455, p. 838, Laws 1851), and these statutes were subsequently amended and extended and are now found in the Code of Civil Procedure. Section 1919, Code Civ. Pro. It has never been doubted that all political parties and their respective conventions and committees were included within the terms of this statute. *Ebbinghausen v. Worth Club*, 4 Abb. N. C. 300; *People ex rel. Coffey v. Dem. Gen. Com.*, 52 App. Div. 170, 65 N. Y. Supp. 57; 164 N. Y. 335. Since these decisions the Legislature has been making rapid strides in the passage of laws regulating political parties. Chapter 195, p. 488, Laws of 1902, amended by chapter 498, p. 1378, Laws of 1906; also chapter 502, p. 1385, Laws of 1906. It has proceeded upon the assumption of the existence of political committees and recognized them as existing entities. To deny their existence is to deny the sun at midday. It is

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said by Presiding Justice Goodrich, in *People ex rel. Coffey v. Democratic General Committee*, supra:

"It is a matter of common knowledge that for many years the machinery of both the great political parties has embraced national, state, county, and ward committees, each in the order of its rank directing the holding of conventions for the nomination of candidates for office and the holding of primaries for the election of delegates to itself and to conventions."

Speaking of the primary election law, the learned justice continues:

"These acts entirely altered the character of the primary election and dignified it as a public function. They changed the character of the general committee from that of a voluntary association to that of a public and statutory body and recognized the equal importance of primary and general elections."

The section of the Code (1919) is broad and includes every form of unincorporated association. It is impossible to imagine a combination of seven or more members not within its provisions. It matters not what its form may be, how its membership shall be constituted, whether it has or has not a constitution, by-laws, or rules, nor the purpose for which it exists, if not incorporated, it is an unincorporated association. I think it is, therefore, clear that the defendant committee may be sued as such.

Criticism is made as to the form of the action, as being against the chairman, and not against the association itself. But this method of bringing unincorporated associations into court is authorized by express provisions (Code Civ. Pro., section 1919), and by precedents in numerous actions so brought (*Hatheway v. Amer. Mining Stock Ex.* 31 Hun, 575).

3. It may be said that, inasmuch as the plaintiff is not a member of the county committee, he may not maintain a suit to restrain the committee from carrying out the enroll-

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ment system promulgated by it. Such a view fails to take cognizance of the dual character of political organizations which is a matter of common knowledge. The organization of political parties, their membership, their primaries, conventions, and committees, and the manner in which they are related and connected, is as familiar to every one as are the salient features of our form of civil government. The defendant committee is dependent upon the Republican party of the county for its existence. It is its agent and servant in the administration of its affairs, and is subject to its control. The plaintiff, as a member, has the right to vote at its primaries and the right to prevent those from voting who have no right so to do. He has also the right to prevent any committee or agent of the party from taking any illegal action that shall prevent a legal voter from voting or from permitting illegal voting. These are among the necessary and essential rights of every member of the party. The instance of a taxpayer's right to sue a public official is not parallel. An instance more nearly in line is that of a stockholder in a joint-stock association (*Ostrom v. Greene*, 161 N. Y. 353), who may restrain illegal action on the part of its board of directors. See, also, *Boston B. B. Ass'n v. Brooklyn B. B. Club*, 37 Misc. Rep. 522, 75 N. Y. Supp. 1076, and *Buker v. Leighton*, 63 App. Div. 507, 71 N. Y. Supp. 610.

4. But it is claimed that the facts alleged in the complaint do not constitute a cause of action. I think otherwise. The complaint sets forth that the plaintiff is a member of the Republican party, that the defendant committee is the general committee for the party in Fulton county, that the statutes of the state prescribe the qualifications of voters at the party primaries, and that the defendant committee, without any authority so to do, have relegated to themselves the right to establish rules and regulations prescribing the qualifications of voters at such primaries in violation of the statute; that in carrying out these regulations, the defendant

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committee has appointed enrolling boards in the respective districts and wards of the county, and conferred upon such boards discretionary power to place upon or strike from the roll, the names of voters, and to limit the voters at the party primaries to the voters whose names appear upon such rolls; that it is the intention of the defendant committee, by means of such enrollment, to prevent many Republican voters having a legal right to vote from voting at the primaries of the party. The matters thus alleged are matters of the gravest importance to all members of the Republican party, and if, as we have decided, they have the legal capacity to protect their rights against such illegal action of a county committee, then I think there can be no question but that the facts alleged constitute a cause of action in their behalf.

5. This brings us to the question whether the alleged acts of the defendant committee are illegal and without authority. An intelligent answer to this question necessitates consideration of certain matters that are common to all political parties and within the common knowledge of all the people, so much so that the court must take judicial cognizance thereof. It is well known that the great body of citizens is divided into political parties and that the machinery of these parties is substantially alike. The source of all authority is the will of the individual members, which first finds expression at the district or ward primaries. These have been carefully regulated by law, and it is here that delegates are elected to county conventions. At county conventions, rules and regulations are adopted for the government of the party, delegates are selected to state conventions (Election Law, Laws 1896, p. 920, c. 909, section 50), candidates for public office in the county nominated, and a county committee appointed to take charge of the affairs of the party. At state conventions similar functions are performed for the state. It is well known that an important function of all conventions is to legislate for the

party and that the committees, appointed for county and state, simply have administrative and executive powers. Historically this system of political organizations and government is as well known and understood as is the division of the government into executive and legislative branches, and conflicts in respect thereto are as rarely known.

It is an undoubted fact that the Legislature may impose upon the several political parties a system for the enrollment of its members and limit the voters at primary elections to the persons so enrolled. It has done this in respect to parties in cities of the first and second classes, and it seems beyond debate that candidates, nominated for office in violation of such enrollment system, must be denied place on official ballots. Any other conclusion would render the laws regulating primaries, nominations, and official ballots absolutely nugatory, to be obeyed or not at the will of any political party. This system of enrollment has not, it is true, been imposed upon cities of the third class and villages; but its use there is made dependent upon the concurrent assent of each political party in such a city or village. It will not be necessary or wise to discuss or consider whether a political party in a city of the third class or a village may of its own motion promulgate and adopt a system of enrollment of its own other and different from the one so held out for acceptance by the Legislature. Much may, no doubt, be said pro and con on that subject. All that is proper to decide on this motion is whether a county committee may, without authority from the party convention, promulgate, adopt, and put in force any enrollment system whatever. This, I believe, the committee has no right to do. But it is not necessary to go even so far as that. All that we need determine is whether such committee may adopt and enforce an enrollment which does violence to the provisions of the statute.

I think no one will seriously contend that the exercise of such powers is within the duties of the committee. It

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has been the diligent purpose of the Legislature to protect and safeguard the party primaries, so that they shall express the will of the members of the party, and that such will shall find free and correct expression in the results. To this end the statute prescribes what the qualifications of voters at primaries shall be. Election Law, section 53. The party neither at its conventions nor by any of its committees, may directly or indirectly make null the statute by prescribing qualifications in conflict therewith. Some of these qualifications may be prescribed by the regulations and usages of the political party; but a committee with administrative and executive duties only may not by resolution prescribe what such regulations and usages are. It is the party, and not the committee, that may do this. Under the statute it is at the primaries where in the first instance the regulations and usages of the party are determined upon the challenging of an intending voter. The county committee may not give power to an enrolling board to make rules governing such matters.

But it may be urged that the Legislature has by implication conferred authority on county committees to establish a system of enrollment of the persons who are entitled to vote at its primaries. Not so. It has, it is true, provided a system and imposed it upon cities of the first and second classes, but left it optional with cities of the third class and villages. No authority to establish another or different system may be inferred from such legislation. The only inference, if any, which may be drawn from such legislation, is that the county committee shall not adopt any system except the one prescribed and in the way and manner there pointed out. I am therefore led to the conclusion that the defendant committee had no authority to formulate the system of enrollment set forth in the complaint and enforce it upon the party primaries, and that such threatened action is illegal and should be prevented.

6. The objection that a temporary injunction should not

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issue needs but a passing notice. That an injury will be done to the rights of the plaintiff and all other Republican voters by putting into operation an illegal system of enrollment must be apparent. Should the defendant committee proceed with its enrollment programme, and the same be enforced at the primaries and be illegal, the injury would be beyond remedy. It is impossible to foretell the confusion which might result. It is highly probable that any candidate, nominated by a party as the result of primaries at which the voters are limited to those whose names are upon an illegal enrollment, would be denied place upon the official ballots. It is here where the discipline of political parties finds application. If its illegally nominated candidates have the same right to a place on the ballot as those legally nominated, the entire system of laws regulating parties and their internal affairs falls to the ground. Should it be finally held that the injunction is improper, no serious injury can result to the defendant committee or to any one else, as it does not appear that the adoption and use of an enrollment is called for by any pressing necessity.

The notice handed up by the plaintiff upon the argument is nugatory. Any order of the court may not be so countermanded and rendered ineffectual. This is especially so when it relates to an injunction, which continues until set aside by the court. The notice in question is simply to the effect that the plaintiff has lost personal interest in the controversy. He gives no authority to the court to vacate the injunction or to discontinue the action. It was conceded by counsel to be simply intended to relieve the plaintiff from costs. The plaintiff may discontinue his action and have his injunction vacated by consenting thereto or by formal stipulation, but he has done neither.

The injunction, as modified, is therefore continued pending the action. Ordered accordingly.

Ottman v. Schenectady Co-operative Realty Co. et al.

CHARLES OTTMAN v. SCHENECTADY CO-OPERATIVE REALTY CO. ET AL.

SUPREME COURT, APPELLATE DIVISION, THIRD DEPARTMENT, MAY, 1907.

§ 3411.

Mechanic's Lien—Costs discretionary—Enforcement.

Where a contractor who failed to perform his agreement and the owner of the property was compelled to finish the contract, in an action by the lienors, it was *held* to be proper that the costs of the proceedings be taken out of the sum due the contractor before paying off the liens under the authority of section 3411 of the Code of Civil Procedure.

(Decided May, 1907.)

Appeal from Judgment on Report of Referee.

From a judgment for plaintiff, defendant and others appeal. Affirmed.

Mr. R. J. Copper and *William Dewey Loucks*, for appellants.

Mr. John D. Miller, for respondent.

COCHRANE, J.—This is an action to foreclose a mechanic's lien. The appeal concerns only the award of costs. The owner of the real property in question is the defendant the Schenectady Co-operative Realty Company. The defendant George Marr contracted with such owner for the construction of certain buildings. After partially performing his contract the contractor defaulted. The owner completed the contract, and after completion there was due to the contractor under

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such contract \$1,240. The parties hereto, other than such owner and contractor, are lienors for labor and material furnished the contractor. The parties stipulated at the trial that the said sum of \$1,240 take the place of and be considered as the real estate, and that the referee direct distribution thereof as if the same had been duly paid into court, without prejudice in the matter of costs. The referee awarded costs to the plaintiff and to each of the lienors who appeared by separate attorneys, payable out of said sum of \$1,240, and also directed payment thereof by the contractor, and directed judgment against such contractor for any deficiency which should remain unpaid to any of the lienors after the application of said sum \$1,240. The contractor does not appeal.

The effect of this award of costs is to cause the said sum of \$1,240, out of which the liens are to be paid, to be absorbed before payment of the appellants' liens in the order of their priority. We entertain no doubt of the power of the referee to award costs payable out of said sum of \$1,240. Section 3411 of the Code of Civil Procedure makes the question of costs discretionary with the court, and directs that the judgment shall specify to whom and by whom such costs shall be paid. The theory of the appellants seems to be that such costs should be paid by the owner. Doubtless there are cases where it would be equitable to charge the owner with the costs. Such were the cases of *Kenny v. Apgar*, 93 N. Y. 539, and *Wheeler v. Scofield*, 67 N. Y. 311, cited by appellants. There the owners were the litigating defendants, and were defeated in the litigation. Here the owner litigated nothing, but admitted liability and offered to pay the amount due on the contract according to the direction of the court. It would have been unjust and inequitable under such circumstances to charge the owner with costs.

Criticism is also made of the award of costs to the defendants. Where a defendant lienor takes no active part in the action, save to make proof of his lien or to observe some

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other formality, he should not, as a general rule, be awarded costs. In this case we have not been supplied with the pleadings or evidence, save that a brief synopsis of the pleadings is given. We are unable to say just what attitude the several defendants assumed at the trial, or whether they raised or litigated any question. We cannot assume that the discretion of the referee in awarding costs to the defendants was improperly exercised.

The judgment should be affirmed, with costs. All concur.

IN RE ACCOUNTING OF ALFRED BODINE.

SUPREME COURT, APPELLATE DIVISION, SECOND DEPARTMENT, MAY, 1907.

§ 2481.

Accounting proceedings—Review—Statutory provisions.

Under section 2481 of the Code of Civil Procedure the surrogate may set aside a decree for "sufficient cause," e. g., fraud, newly-discovered evidence; but where a decree was set aside on the ground that the contestants were guilty of laches in hastening the matter to a final determination, it was *held* on appeal that the surrogate could not vacate the decree on the ground stated.

(*Decided May, 1907.*)

Appeal from Surrogate's Court, Richmond County.

Appeal from an order vacating a decree allowing the administrator's account and referring the matter back to the referee. Reversed.

Mr. Alfred G. Reeves (Harold Swain on the brief), for appellants.

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Mr. Henry J. McCormick, for respondent.

MILLER, J.—This proceeding, the ordinary accounting of an administrator, was begun in 1879 by the filing of the administrator's account and objections thereto. After many protracted adjournments and various substitutions of attorneys and referees, it resulted in a referee's report, and a decree confirming it, entered June 21, 1899, by which the administrator was charged with the sum of \$58,244.31. All proceedings were had on notice to the administrator, and he appeared in person and by attorney before the referee, whose report was confirmed as aforesaid. He was served with notice of the entry of said decree, and after the time to appeal from it had expired the motion was made by him and one of his sureties, resulting in the order appealed from which vacated said decree and referred the matter back to said referee for further hearing and determination. The grounds for the motion stated in the moving affidavits are that the contestants have been guilty of laches in not pressing the issue to a speedy determination; that as a result of the various delays and substitutions many of the administrator's books, vouchers, and papers have been lost, so that he cannot now, as he says, "exculpate himself"; and that at some stage of the proceeding the administrator's counsel stated that the next of kin had agreed to abandon their claims.

Section 2481 of the Code of Civil Procedure specifies the grounds upon which the surrogate may make such an order, to wit: "Fraud, newly discovered evidence, clerical error, or other sufficient cause." It is not pretended that there was any fraud, that any new evidence has been discovered, that any clerical error was committed, or that any like cause existed for granting the motion; and it is plain that the words "other sufficient cause" must have an "ejusdem generis" interpretation. It is not necessary to cite authorities upon the proposition that said section can-

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not possibly be construed so as to include any of the alleged grounds of this motion. The respondents' brief treats the order as one opening a default; but, if there was a default, it was wilful. Said administrator, after appearing before the referee as aforesaid and while being examined as a witness, refused to submit to further examination and abandoned the proceedings. It is asserted that the proceeding was barred by the statute of limitations; but, however dead it may have appeared at times, it had sufficient life at all times to be resurrected.

The only other ground urged on the brief is that the referee acted upon proof that he had no right to consider. It is not shown that there is the slightest merit in any of the contentions I have enumerated; but, if there were, the place to urge them was before the referee and the surrogate on the application to confirm the report, and, if error was committed, the remedy was by appeal. The surety is not entitled to intervene now to reopen the proceedings and start a new series of delays. He was not entitled to notice of the proceedings leading up to the decree, and in the absence of fraud is bound by it.

Our conclusion is that, upon the case presented, the surrogate had no power to grant the order appealed from; and it should be reversed.

Order of the Surrogate's Court of Richmond County reversed, with \$10 costs and disbursements. All concur.

Sutphen v. Clark.

JENNE C. SUTPHEN v. GEORGE E. CLARK.

SUPREME COURT, APPELLATE DIVISION, FOURTH
DEPARTMENT, MAY, 1907.

§ 2869.

Justices of the Peace—Jurisdiction.

Section 2869 of the Code of Civil Procedure provides that a nonresident plaintiff can maintain an action before a justice only "in the town where the defendant resides or in any adjoining town." The corporation lines of the city of Lockport are wholly within the town of Lockport, and a nonresident cannot maintain an action in a city justice's court against a resident of an adjoining town, but not the city of Lockport.

(Decided May, 1907.)

Appeal from Niagara County Court.

Plaintiff appeals from a judgment of the Niagara County Court, reversing a justice court judgment for the plaintiff, and from an order directing judgment. Affirmed.

Mr. Henry M. Davis, for appellant.*Mr. David Miller*, for respondent.

ROBSON, J.—The only question to be determined on this appeal is presented by reason of a difference of opinion of the parties as to the meaning of and construction to be given to that portion of the charter or legislative enactment continuing the reconstructed municipal corporation known as the city of Lockport, which designates the powers and limitations of justices of the peace for that city who have been

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qualified under the provisions of that statute to act as such judicial officers.

The corporation lines of the city of Lockport are wholly within the town of Lockport, from the interior of which town the territorial extent of the city has been entirely taken. The city, therefore, adjoins only the town of Lockport. The provision of the present charter of the city, prescribing the jurisdictional limits of the city's justices of the peace, is found in section 76, c. 120, p. 224, Laws of 1886, and is that each justice of the peace of the city "shall have the same territorial jurisdiction as if said city constituted a part of the town of Lockport." Under the provisions of subdivision 2, section 2869, of the Code of Civil Procedure, a nonresident plaintiff can maintain an action before a justice only "in the town where the defendant resides or in any adjoining town thereto." In this case the plaintiff was a nonresident, and the defendant resided in the town of Newfane, which adjoins the town, but not the city, of Lockport. The action, therefore, was not brought either in the town in which defendant resided or in a town adjoining thereto. Plaintiff seeks to support the judgment, which she obtained in justice court, claiming that the provision of the charter above quoted endows a justice of the peace of the city of Lockport with jurisdiction in every case of which a justice of the peace of the town would have cognizance, and with power in every particular to hear, try, and determine the same which such a justice would have.

This provision of the city's charter was before this court for consideration in the case of *Gould v. Mahaney*, 39 App. Div. 426, 57 N. Y. Supp. 363; and although the exact point now presented was not then before the court for determination, it is clearly pointed out in the opinion delivered in that case that the intent of the Legislature, expressed in this provision, "was to make it certain that the jurisdiction of the official was to embrace the entire county." Page 428 of 39 App. Div., page 363 of 57 N. Y.

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Supp. This being the intended effect of the provision, it is not permissible to enlarge its operation to the extent which plaintiff urges it should be, with the result that greater powers and ampler jurisdiction would, in that view, be conferred on justices of the peace in the city of Lockport than those possessed by justices in the towns.

The judgment and order appealed from should be affirmed, with costs to respondent.

Judgment and order affirmed, with costs. All concur.

JULIUS KRAININ v. BENJAMIN J. COFFEY

**SUPREME COURT, APPELLATE DIVISION, SECOND
DEPARTMENT, MAY, 1907.**

§ 1670.

Lis Pendens—Filing—Possession of real estate.

When one has a contract of purchase of real estate, but has been unable to obtain possession of same because of a defect in the title, a *lis pendens* filed under the authority of section 1670 of the Code of Civil Procedure cannot be enforced against said property, for the reason that above section relates to an action brought to recover judgment affecting the title, enjoyment or possession of real estate.

(Decided May, 1907.)

Appeal from Special Term, Kings County.

Plaintiff appeals from an order cancelling a *lis pendens*.
Affirmed.

Mr. Joseph C. Abramson, for appellant.

Mr. C. Arthur Coan, for respondent.

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GAYNOR, J.—This is claimed by the plaintiff to be a suit to enforce an equitable lien on real estate. The complaint is that the defendant made a written agreement to convey to the plaintiff on a day named a lot of land; that the plaintiff paid \$500 of the purchase price on the making of the contract; that on the contract day the defendant was and ever since has been unable to convey a good title; that it cost the plaintiff \$175 to examine the title; and that by reason of these facts the plaintiff has an equitable lien on the land for \$675. Specific performance is not prayed for, but only the foreclosure of this lien.

There is no such lien legally or equitably. A vendee of real estate who has not been let into possession under the contract has no lien. There is no such head of equity. Reference to any text-book on equity shows this; and we are not without a decided case on the point. *Klim v. Sachs*, 102 App. Div. 44, 92 N. Y. Supp. 107. The order cancelling the *lis pendens* was therefore well granted. It is true that the language of some opinions (*Lindheim & Co. v. Central Const. Co.*, 111 App. Div. 275, 97 N. Y. Supp. 619) to the effect that the court will not search the complaint as on a demurrer to see whether the case be one for a *lis pendens*, is very large, but it has its limitation. The filing of a *lis pendens* is permitted only "in an action brought to recover a judgment affecting the title to or the possession, use or enjoyment of real property." Code Civ. Pro., section 1670. On a motion to cancel the *lis pendens* the complaint must certainly be looked into, and with all the scrutiny necessary, to see whether the action be of this kind. If the facts alleged in the complaint are not sufficient to make it such an action, the prayer for relief cannot make it such. If, for instance, the action be on a promissory note, the prayer for relief cannot turn it into one brought to get a judgment of lien upon or affecting the title to real property.

The order should be affirmed.

Order affirmed, with costs and disbursements. All concur.

Morgan et al. v. Mutual Benefit Life Ins. Co.

SUSAN M. MORGAN ET AL. v. MUTUAL BENEFIT
LIFE INS. CO.

SUPREME COURT, APPELLATE DIVISION, FOURTH
DEPARTMENT, MAY, 1907.

§ 438.

Service by publication—Subject of action—Statutes—Personalty.

The action by an assignee of an insurance policy for advances thereon, is considered as personal property under section 438, subd. 5, of the Code of Civil Procedure, which provides that a nonresident defendant may be served by publication when the complaint asks judgment that the defendant be excluded from an interest in personal property within the state and that a nonresident beneficiary could be served by publication.

(Decided May, 1907.)

Appeal from Special Term, Erie County.

From an order denying a motion to vacate an order for the service of summons by publication on certain non-resident defendants, defendant, the Mutual Benefit Life Insurance Company, appeals. Affirmed.

Mr. Joseph H. Morey, for respondents.

Mr. L. L. Babcock, for appellant.

KRUSE, J.—The defendant insurance company, although it has been properly served with the summons, attacks the order directing the service by publication of the summons upon its nonresident codefendants, upon the ground that such service will not be effective and a judgment so obtained will not be binding upon the defendants served in that manner.

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The action is brought upon a life insurance policy of \$5,000, issued by the insurance company and delivered in this state to a resident thereof, who assigned the same, with the consent of the insurance company in the state, the assignee also being a resident thereof. The policy is now in the state, and held and owned, as the complaint alleges, by the plaintiffs, who are trustees under the will of the assignee, and are likewise residents of the state. The assignment was made as collateral security for premiums advanced by the assignee, upon the policy, amounting to about the sum of \$4,500, and which is the sum claimed by the plaintiffs, leaving due to the beneficiaries about \$500, to which the plaintiffs make no claim. The beneficiaries are made codefendants with the insurance company. They are all nonresidents of this state, residing in the states of California, Iowa, Missouri, and Colorado. The insurance company is a foreign corporation, incorporated under the laws of the state of New Jersey, but does business in this state under a license issued by the superintendent of insurance, and is subject to the laws of this state as regards the business done here, having made deposits of securities with the superintendent of insurance for the protection of its policy holders, and appointed him as its agent and attorney, upon whom all process may be served the same as though the insurance company were a domestic corporation. The policy does not seem to fix a particular place of payment by its terms.

The insurance company admits its liability upon the policy upon which the plaintiffs' cause of action is based. It contends, however, that there are conflicting claimants to the insurance moneys, and sets up in its answer the pendency of another action by its codefendants against it in the state of California to recover upon the same policy. The question which the defendant insurance company seeks to have determined upon this appeal is whether a judgment so obtained against it and its codefendants will be binding upon

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its codefendants as between itself and them, and so protect the insurance company in paying out the moneys due upon the policy in accordance with the judgment which may be rendered in the action. The motion to vacate the order of publication was made on the same papers upon which the order was granted. Whether the defendants upon whom such substituted service was directed to be made have been served does not appear, nor is there any suggestion in the record that they may not appear and waive any infirmity in the order, if any there be, or that they have not already done so. Under these circumstances it may well be doubted that the question raised by the insurance company is properly before the court for determination. Neither is it at all certain that the action may not proceed against the insurance company alone in the event that the plaintiffs will be unable to obtain service of the summons upon its codefendants, or that they do not voluntarily appear in the action. It is true that the plaintiff has made them parties defendant, and the judgment demanded indicates that the relief sought is to declare a lien upon the policy of insurance and the moneys due thereon, to the amount of the plaintiffs' claim. If the plaintiffs have not the legal title thereto, but only an equitable interest therein, very likely the individuals who have the legal title are required to be made parties to the action with the insurance company. *Steinbach v. Prudential Insurance Company*, 172 N. Y. 471. The facts set forth in the complaint, however, seem to warrant the conclusion that the defendants impleaded with the insurance company, while proper parties, may not be necessary parties to the action, and, if so, the action may proceed without them. Although the assignment was made and the policy is now held as security for the payment of moneys advanced by the assignee as premiums upon the policy, still, if the assignment vested the title thereto in the assignee, payment by the insurance company to the plaintiffs of the amount due them thereon would be a satisfaction

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and discharge of the claim to the extent of such payment.

The complaint alleges the assignment of the policy to the plaintiffs' testator, and further alleges that the plaintiffs are now the holders and lawful owners of the policy as security for the payment of the moneys paid as therein stated, amounting to the sum named. The mere fact that the assignment was made as collateral security, and that the beneficiaries therein named may reinvest themselves with title to the policy by paying the amount due to the plaintiffs, does not deprive them of the right to collect the amount due to them from the insurance company. The claim is a direct liability against the insurance company. The fact that there are conflicting claimants to the insurance moneys, or that there are suits threatened or have since the commencement of this action been brought against the insurance company in other states, is not sufficient reason for requiring the plaintiffs to bring in all other persons claiming adversely to them as parties to this action, nor to refrain from proceeding in this action against the insurance company without them. If embarrassment arises to the insurance company from conflicting claimants residing in different states and bringing actions therein upon the same claim, it is the necessary result of going out of the state where it was incorporated into other states and doing business therein, and voluntarily submitting itself to the conditions imposed by the laws of the particular state in which it carries on the business. It is no answer to such actions that a judgment obtained against it may not protect it against claims of other persons not parties to the suit, although, as a matter of comity, proceedings in an action may be stayed where there is a pending action in another state in which the controversy between the parties may be adjudicated. *Sulz v. Mutual Reserve Fund Life Ass'n*, 145 N. Y. 563; *Douglass v. Phoenix Insurance Co.*, 138 N. Y. 209, 221, St. Rep. Assuming, however, that the insurance company may at this time and in this manner question the validity

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of the order, we are of opinion that the order was properly granted. The nonresidence of the defendants directed to be served by publication and the inability to serve personally in this state is conceded. The insurance company urges that the subject matter of the action is not specific personal property within the meaning of subdivision 5 of section 438 of the Code of Civil Procedure, and therefore the judgment would be inoperative, since nonresidence alone is insufficient to authorize the order for substituted service. *Montgomery v. Boyd*, 60 App. Div. 133, 70 N. Y. Supp. 139. Section 438 of the Code provides that an order directing the service of summons upon a defendant without the state or by publication may be made when the defendant is not a resident of the state, and, also, among others:

“(5) Where the complaint demands judgment, that the defendant be excluded from a vested or contingent interest in or lien upon specific real or personal property within the state; or that such an interest or lien in favor of either party be enforced, regulated, defined or limited; or otherwise affecting the title to such property.”

The statutory construction law defines the term “personal property” as follows:

“The term ‘personal property’ includes chattels, money, things in action, and all written instruments themselves, as distinguished from the rights or interests to which they relate, by which any right, interest, lien or incumbrance in, to or upon property, or any debt or financial obligation is created, acknowledged, evidenced, transferred, discharged or defeated, wholly or in part, and everything, except real property, which may be the subject of ownership. The term chattels includes goods and chattels.” Section 4, Laws 1892, p. 1486, c. 677.

It is, however, urged on behalf of the insurance company that the subject-matter of this action is not personal property having a situs within the state. As has already been pointed out, the insurance company, although a foreign

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corporation, incorporated under the laws of the state of New Jersey, does business in this state under a license issued by the superintendent of insurance and is subject to his supervision the same as a domestic insurance company. Insurance Law, Laws 1892, p. 1941, c. 690, section 25. It is required to keep securities on deposit with the superintendent of insurance to be held in trust for the benefit of the policy holders. Insurance Law, section 26. It is also required to execute and file a written appointment of the superintendent of insurance as agent and attorney in this state, upon whom 'all lawful process in any action or proceeding against the corporation may be served with the same effect as if it was a domestic corporation.' Service upon such attorney shall thereafter be deemed service upon the corporation." Insurance Law, section 30. The policy was issued in the state to a resident thereof, and was assigned by him with its consent to another resident of the state, who died a resident thereof, leaving the policy as an asset of his estate, and is now in the state held and owned by trustees of his will appointed by, and under the control of the courts of this state. It is payable in the state, although not in express terms, and the securities deposited by the insurance company are held by the superintendent of insurance as security therefor. Under these circumstances, we think the insurance company must be regarded as an inhabitant of the state so far as all matters in the suit are concerned, and the situs of the subject-matter of the action as within this state.

The question of the situs of intangible rights and claims of this character has frequently arisen in attachment proceedings and judgments based thereon attacked for want of jurisdiction, where personal service of process was not made upon the parties against or upon whose right or claim such process or adjudication was made. We are well aware that the decisions upon that question may not be in accord (20 Cyc. 1036, 1037), and we shall not attempt to reconcile

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them. The courts of our own state have frequently passed upon the question, and the following cases may serve as types of two classes, one where the proceeding has been held ineffective and void, and the other where the proceeding as been held valid: *Douglas v. Phoenix Ins. Co.*, 138 N. Y. 209; *National Broadway Bank v. Sampson*, 179 N. Y. 213; *India Rubber Co. v. Katz*, 65 App. Div. 349, 72 N. Y. Supp. 658; *Lancaster v. Spotswood*, 41 Misc. Rep. 19, 83 N. Y. Supp. 572, affirmed in 86 App. Div. 627, 83 N. Y. Supp. 1109. In the first two cases it was held, upon the state of facts as there presented, that the attachment proceedings and adjudication based thereon was not effective, while upon another state of facts somewhat different the last two cases held the attachment good and the proceedings valid. The facts of the two classes of cases are alike in many respects. We need not stop to point out the precise difference. We assume that they are in entire harmony and accord, but think that the facts in this case are quite analogous to those in the last two cases, and that this case is within that class where the attachment was upheld and the seizure thereunder effective. The question has been quite recently before the United States Supreme Court in two cases. *Harris v. Balk*, 198 U. S. 215, 25 Sup. Ct. 625, 49 L. Ed. 1023; *Louisville & Nashville Railroad Co. v. Deer*, 200 U. S. 176, 26 Sup. Ct. 207, 50 L. Ed. 426. In the *Harris* Case a resident of North Carolina, who was owing another resident of that state, went temporarily to Maryland, and while there was garnisheed by the creditors of the man whom he was owing in an action brought in a court of that state; the principal defendant therein being served with process by publication according to the laws of that state. Judgment was entered and the garnishee paid the same. After the garnishee's return to the state of North Carolina he was sued by his creditor in that state. He pleaded the Maryland judgment and payment thereof as a defense, but the North Carolina court refused to recognize the judgment

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and payment so made, and directed judgment against him. The United States Supreme Court reversed the judgment of the North Carolina Court, and held that, under the full faith and credit clause of the federal Constitution, the Maryland judgment should have been recognized, and that the payment thereof extinguished the original debt; Mr. Justice Peckham saying (page 223 of 198 U. S., p. 627 of 25 Sup. Ct. [49 L. Ed. 1203]):

“We can see no reason why the attachment could not be thus laid, provided the creditor of the garnishee could himself sue in that state and its laws permitted the attachment.”

The question was again presented in the *Louisville & Nashville Railroad Company v. Deer*, supra. In that case it appeared that the railroad company did business and was liable to service and suit in the state of Florida, and was owing a resident of the state of Alabama. The creditor of the latter brought suit in Florida, in which the railroad company was summoned as garnishee; the Alabama creditor, the principal defendant therein, being served by publication only. A judgment was recovered, the railroad company paying the sum due thereon into court. Thereafter the Alabama creditor brought suit against the railroad company in the state of Alabama. The Alabama court refused to recognize the Florida judgment and the payment made thereon, and upon appeal to the United States Supreme Court that judgment was reversed; it being held that the Florida judgment was valid against the Alabama creditor, and that the Alabama court should have given full faith and credit thereto under the provisions of the federal Constitution. It would seem, therefore, that under these decisions of the United States Supreme Court a claim for moneys due upon this policy from the insurance company to its nonresident codefendants would be subject to an attachment in this state by a creditor of such nonresident codefendants, for they themselves could sue the insurance company in this state upon their claim, and, if so, their creditors could

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attach the claim. So that whether the plaintiffs are creditors of the insurance company or of the nonresident codefendants, or merely have a lien, it would seem to follow that the claim based upon the policy and the moneys due thereon has such a situs in this state as to enable the courts of the state to pass upon and subject it to their jurisdiction by the proper process. Even if our local laws as declared by the courts of this state are inadequate to subject such a claim to seizure under a warrant of attachment, yet that is not decisive of the question involved in this case, since this proceeding is not an attachment. If the subject-matter of this suit and the cause thereof is specific personal property within the state, although not attachable, it may be acted upon by the courts of this state, and the adjudication thereof be binding upon all the parties to the suit as a judgment in rem.

The suggestion is made that, the insurance company having been incorporated under the laws of the state of New Jersey, its domicile is there, and this suit may be maintained in the courts of that state. Undoubtedly that is true, but it also has at least a quasi domicile in this state. The very purpose of requiring it to deposit securities and appoint the superintendent of insurance as its agent and attorney was to secure its policy holders and subject the company and its property within this state to the jurisdiction of our courts. In the case of *New England Life Insurance Co. v. Woodworth*, 111 U. S. 138, 4 Sup. Ct. 364, 28 L. Ed. 379, where it appeared that the husband of the insured commenced an action in the state of Illinois against the insurance company organized under the laws of the state of Massachusetts upon a policy of insurance, the insured having died in the state of New York, the plaintiff thereafter going into the state of Illinois, and taking the policy with him, it was held that the action was maintainable in the Illinois court, and that the company might be regarded as present and an inhabitant of the state where it had an agent

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upon whom pursuant to the laws of that state process might be served. That case was cited with approval and the principle applied in the case of *Sulz v. Mutual Reserve Fund Life Ass'n*, 145 N. Y. 563.

If such an action as this is not maintainable in the courts of this state, and the insurance company may resist payment on the policy without making all of the persons claiming an interest in the moneys due thereon parties to the suit, serving them personally with process, it is difficult to see how the company can be compelled to pay at all, unless all of the persons are in accord and unite in one suit, or voluntarily appear therein, since the claimants reside in five different states. Certainly there is no more reason for bringing the action in the California court than here.

The order should be affirmed, with \$10 costs and disbursements. All concur, except *SPRING* and *ROBSON, JJ.*, who dissent.

SPRING, J. (dissenting).—The appellant is a life insurance corporation organized in the state of New Jersey, but authorized to transact business within the state of New York. In 1886 it issued a policy of insurance to Elizabeth A. Morgan upon the life of her husband, Orson A. Morgan. The policy provided that, in case the wife died before the insured, the amount of such insurance should be payable to his children. The policy, by its terms, was forfeitable in the event of the failure to pay the annual premiums stipulated in the instrument as they came due. On the 26th of March, 1871, the said Morgans were unable to continue the payments of said premiums and assigned the same and all money due or to grow due thereon, with assent of the appellant, to one Dayton A. Morgan, upon the agreement that said assignee pay said premiums, and the assignment was to be operative until all sums paid by him for premiums, with interest, should be repaid to him. Relying upon said assignment, the said Dayton A. Morgan, and after his death

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his successors in interest, now represented by the plaintiffs, continued to pay all the premiums in accordance with the policy until the death of the insured in May, 1905. The aggregate sum so paid is \$4,483.80, which the plaintiffs seek by this action in equity to establish, with interest, as a lien upon said policy and the money payable by its terms. The wife of the insured died a year before his death, and his children, all nonresidents of this state, are the persons upon whom substituted service was ordered. The insured and his wife, at the time of the issuance of the policy, were residents of the state of New York and were at the time of the assignment thereof to D. A. Morgan, who was also a resident of this state and continued to be until his death, and his will was admitted to probate in this state, and the plaintiffs, his successors in interest, also have their abode here. The assignee retained the policy and assignment until his death, and at the time of the commencement of this action these papers were in possession of the plaintiffs by transmission from the assignee. An order for publication of the summons to bring in these nonresident children of the insured was granted by a justice of the Supreme Court, and a motion was made at Special Term by the appellant to set aside this order, which motion was denied. Since the commencement of this action the children of said insured have commenced an action in the superior court of California, which is a court of competent jurisdiction, to recover upon the policy issued by the defendant, and that action is now pending, due service having been made upon the appellant.

The order for publication was granted pursuant to section 438, subd. 5, Code Civ. Pro. That section provides that such an order may be made "where the complaint demands judgment, that the defendant be excluded from a vested or contingent interest in or lien upon, specific real or personal property within the state; or, that such an interest or lien in favor of either party be enforced, regulated, defined, or

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limited; or otherwise affecting the title to such property." The point of the controversy before us on this appeal is whether this policy of insurance is "specific personal property within this state"; and the proposition is a very troublesome one. The policy, as already noted, was delivered in this state and the first intended beneficiary and the insured resided here. Upon the death of the insured, his children became the beneficiaries, and they are the creditors and the insurance company the debtor. The plaintiffs are not creditors of the insurance company. Dayton S. Morgan, the original assignee, loaned, "advanced," to the wife of the insured the amount of the first premium, and thereafter, at her request, continued to pay the premiums as they matured from year to year. The policy was assigned, not absolutely to Morgan, but as a pledge for the payment of the debt. It may be that it was the expectation of the parties that repayment should come eventually from the avails of this policy, but Mrs. Morgan and the children would have been entitled at any time to a return of the policy and a cancellation of the assignment upon the payment of the debt secured by it. The insurance company agreed to pay the sum of \$5,000 upon proof of death of the insured, which has been furnished, to Elizabeth Morgan if living upon the decease of her husband, and, in the event of her death, to the children of the deceased. The proposition is quite firmly established that the situs of a debt is at the abode of the creditor. *Douglass v. Phoenix Ins. Co.*, 138 N. Y. 209. There is an exception in favor of the creditor of a nonresident creditor in attachment proceedings whereby the situs of the debt is at the domicile of the debtor. In this case the domicile of the debtor is in New Jersey, unless something in this transaction, or because it does business in this state, makes its domicile here. Undoubtedly the appellant could be sued in this state on this insurance contract. No one questions that. The privilege of doing business is accompanied with the necessity of submitting to our jurisdic-

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tion. It has been sued, and answered. The plaintiffs are, however, endeavoring in a suit in equity to have determined the rights of conflicting claimants to the debt due because of the policy. The complaint shows the interest of the non-resident claimants, and their presence in the action is essential before a complete determination of the case can be had. *Steinbach v. Prudential Ins. Co.*, 172 N. Y. 471. The burden is upon the plaintiffs to bring in these parties (*Mahr et al. v. N. U. Fire Ins. Co.*, 127 N. Y. 452); and they realized this necessity, for they have made them defendants in name, and by the order of publication claim to have acquired jurisdiction over them sufficiently to enable the court to determine the extent of their interest, if any, in this debt evidenced by the policy of insurance.

An insurance company doing business in various states is subject to an action on a policy issued by it in each jurisdiction, but comity among the states would probably prevent more than one recovery, and the first action would be likely to have the precedence. *Sulz v. Mutual Reserve Fund Life Ass'n*, 145 N. Y. 563. The presence of the policy is not essential to the maintenance of the action, although a circumstance in aid of it. The res, or substantial thing, is the debt of which the policy is the evidence. Administrators of an intestate may be appointed in several states and claimants of the insurance may reside in each of them, and may bring actions at their places of residence to recover the amount due by the terms of the policy. The present case is not of that class. The action is in equity based upon the averment of an indebtedness to the plaintiff's assignor secured by the policy, and the purpose of the action is to establish the claim of the plaintiffs by reason of the premiums paid and make the claim a paramount lien upon the policy and the debt. The controversy is not with the insurance company, but with the nonresidents they desire to bring within our state to enable the litigation to be carried on. The only interest the insurance company

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has is to be certain that the nonresidents are brought within the judicial domain of this state, so that the judgment in rem will be effective and a bar to any action by the children of the insured, to whom, upon the face of the policy, the insurance moneys belong. If this were an action at law to recover the amount due by the terms of the policy, a different proposition might be presented from the one with which we now have to deal. A levy under a warrant of attachment is made upon personal property where manual delivery can be had, "including a bond, a promissory note, or other instrument for the payment of money, by taking the same into the sheriff's actual custody" (section 649, subd. 2), and "upon other personal property by leaving a certified copy of the warrant * * * with the person holding the same" if the property be a demand "other than specified in the last division, with the person against whom it exists (subdivision 3). In these subdivisions, therefore, distinct classes of personal property require different modes of service. Where the property is susceptible of delivery in specie, one method of service is provided for, and in that class of property is included an instrument for the payment of money. Where property is so intangible as not to be deliverable manually, like a debt or demand, another mode of service of the warrant is prescribed. Cases arising under these subdivisions may consequently be relevant in the consideration of the character of this policy.

In *Trepagnier & Bros. v. Rose*, 18 App. Div. 393, 46 N. Y. Supp. 397, it was held that a fire insurance policy under which a loss had occurred and been adjusted was not an instrument for the payment of money within subdivision 2, section 649. Upon appeal to the Court of Appeals (155 N. Y. 637), the question certified was as follows:

"Is a policy of fire insurance under which a loss has occurred which has been adjusted, and under which nothing remains to be done but the payment by the insurer to the insured of a fixed sum of money, an 'instrument for the

payment of money' within the meaning of subdivision 2 of section 649 of the Code of Civil Procedure, and is a valid levy under a warrant of attachment made on such a policy by serving a certified copy thereof on the proper officer of the insurer, the policy itself not being taken into the sheriff's actual custody?"

The court answered the first branch of the question in the negative, and the second in the affirmative. The effect of the decision, therefore, was that an insurance policy is not property capable of manual delivery, but the debt which it represents is the res, or property right. The same principle was recognized in *Kratzenstein v. Lehman*, 19 App. Div. 228, 46 N. Y. Supp. 71.

In these cases, in construing subdivision 2 of section 649 there is no suggestion that an insurance policy is personal property capable of manual delivery, unless it comes within the definition of an instrument for the payment of money. It therefore must be a mere evidence of the obligation instead of the debt or demand itself. In *N. Y. Life Ins. Co. v. Universal Life Ins. Co. et al.*, 88 N. Y. 424, in construing section 1778 of the Code of Civil Procedure, it was held that a policy of life insurance is not "evidence of debt for the absolute payment of money upon demand, or at a particular time" within the meaning of that section. A foreign insurance corporation retains the domicile of its origin, however extensive its business may be, and although it may have other jurisdictions for certain purposes. The enlargement of the business of insurance has made it necessary that each state safeguard its policy holders by requiring, among other things, that the foreign corporation shall be amenable to the service of process within the state, but that does not change the situs of the corporation. In *Douglass v. P. Ins. Co.*, 138 N. Y. 209, an insurance corporation issued a fire insurance policy to a resident of Franklin county in this state upon property in that county which was destroyed by fire, the loss exceeding the amount

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of the insurance. The insurance company was doing business in the state of Massachusetts with an agent upon whom process might be served. An action was commenced in that state by a creditor of the insured against him and the insurance corporation, and a levy was claimed to have been made upon the debt evidenced by the policy of insurance pursuant to the warrant of attachment. The insured commenced an action in this state on the policy and the insurance company answered, pleading the Massachusetts attachment action, and alleged that by the levy the debt became subject to the control of the court in that state. The plaintiff demurred and the demurrer was sustained by the Court of Appeals. The court, in passing upon the effect of the appointment of an agent in that state, say at page 220 of 138 N. Y. :

"It has been held that by such act the corporation does not change its domicile of origin or its residence. It becomes bound by judgments rendered upon service on the designated agent, because it has consented so to be bound, but it remains as before a resident of the state where it is incorporated."

Further, in commenting upon the question of jurisdiction:

"We think the rule is that a domestic corporation at all times has its exclusive residence and domicile in the jurisdiction of origin, and that it cannot be garnisheed in another jurisdiction for debts owing by it to home creditors, so as to make the attachment effectual against its creditor in the absence of jurisdiction acquired over the person of such creditor. * * * This court has disclaimed jurisdiction in the courts of this state to attach debts owing by a foreign corporation, or interests in the stock of such corporations belonging to nonresidents by notice or process served on the agents of such corporations in this state."

In *Plimpton et al. v. Bigelow*, 93 N. Y. 592, shares of stock owned by nonresidents were attached in this state in

which the corporation had an office, with the president and officers carrying on the corporate business, and the court in considering whether the shares of the nonresidents could be levied upon in the attachment proceeding used this language at page 598 :

"But we regard the principle to be too firmly settled by repeated adjudications of the federal and state courts to admit of further controversy that a corporation has its domicile and residence alone within the bounds of the sovereignty which created it, and that it is incapable of passing personally beyond that jurisdiction."

And again at page 602 :

"We are therefore of the opinion that the fundamental condition of attachment proceedings, that the res must be within the jurisdiction of the court in order to an effectual seizure, is not answered in respect to shares in a foreign corporation by the presence here of its officers, or by the fact that the corporation has property and is transacting business here."

These cases are reviewed at length and affirmed in *Nat. Brd. Bank v. Sampson*, 179 N. Y. 213, and the court says at page 225 of 179 N. Y. :

"It seems clear that a debt, to be subject to attachment, must have a situs somewhere and can be impounded only in the jurisdiction where such situs exists, which is clearly where either the creditor or debtor resides. The laws relating to attachments do not authorize a proceeding in this state to seize a credit owing to a resident of another state, where neither the creditor nor the debtor is a resident here. Nor, as we have seen, could the state make a debtor a resident by so declaring, when such was not the fact.

See *Von Hesse v. Mackaye*, 55 Hun, 365, 8 N. Y. Supp. 894, affirmed on opinion below, 121 N. Y. 694.

All these cases recognize that the situs of the debt is ordinarily that of the creditor, except that in attachment proceedings it may be at the domicile of the debtor. As already :

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stated, the residence of none of the creditors is in this state and the domicile of the debtor is New Jersey. It seems to me that the scope of the prevailing opinion is fundamentally erroneous in deciding that these lienors are creditors of the insurance company. They are creditors of the Morgan representatives, but not of the appellant. The plaintiffs would have proceeded by attachment if the policy had not been in their possession, if the position they contend for is correct. They then would have been like the Massachusetts creditor in *Douglass v. P. Insurance Company*, *supra*, only the policy would have been in this state. The proposition is fundamental that in proceedings to reach property of a nonresident it must be within the state. If it be a bin of grain or a pile of iron ore, it is tangible and the judgment can readily fasten upon it, or it can be delivered to the judgment creditor. If the property is intangible, it is equally leviable by warrant of attachment, only the *res* must be within the state. If it be a note or instrument for the payment of money, manual delivery is possible. If it be a debt of a foreign corporation, not represented by a note, the debt follows the domicile of the body corporate and judgment must be awarded in its state. The manner of service provided in subdivision 3, section 649, denotes that the paper, whatever it may be, is of no more than nominal value when disconnected from the demand itself, unless the instrument be for the payment of money. Of course, an action of replevin or trover would lie to recover an insurance policy if wrongfully taken from the custody of its owner. Its recovery might not establish the title to the money due on it. A like action would be maintainable to recover a deed converted from the true owner, but the value of the deed would not be the value of the premises described in it, and the title of the premises would be unaffected by the judgment, especially if they were in another state.

The only importance of the present action is to determine the rights of the parties to the money due according to the

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terms of the policy. The money is in New Jersey, and that is the "specific personal property" which the plaintiffs are after. The controversy is between them and the other claimants. Jurisdiction of the insurance company is readily obtainable, but not of these nonresident claimants. Actions have frequently been maintained against life insurance companies, even where they might be subject to other actions, and consequently expense and embarrassment be caused to them. *Sulz v. M. R. F. L. Ass'n*, 145 N. Y. 563; *New Eng. Ins. Co. v. Woodworth*, 111 U. S. 138, 4 Sup. Ct. 364, 28 L. Ed. 379; *Equitable Life Ins. Co. v. Brown*, 187 U. S. 308, 23 Sup. Ct. 123, 47 L. Ed. 190. Those, however, were each an action by an administrator to recover on the policy, and other rival claimants were not made parties. The controversy in each case was solely with the insurance company. The plaintiffs here are endeavoring to exclude parties and asserting that they must be within the jurisdiction of the court before a final judgment can be awarded. The only way a nonresident can be made a defendant against his will is where he has property within the dominion of the state.

In the prevailing opinion the recent cases of *Harris v. Balk*, 198 U. S. 212, 25 Sup. Ct. 625, 49 L. Ed. 1023, and *Louisville & Nashville R. R. Co. v. Deer*, 200 U. S. 176, 26 Sup. Ct. 207, 50 L. Ed. 426, are relied upon in support of the validity of the order appealed from. *Harris* and *Balk* were both residents of North Carolina, and *Harris* owed *Balk* \$180. *Balk* was indebted to *Epstein*, a resident of the state of Maryland. *Harris* was in Maryland on business, and *Epstein* caused a writ of attachment to be issued out of the proper court attaching the debt of *Harris* to *Balk*. *Harris* was personally served with the process. He returned to North Carolina before the return day of the writ, but made an affidavit that he was owing *Balk* \$180, and by his counsel in Maryland consented in the attachment suit to an order condemning him for \$180 as such garnishee, and judgment

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was entered and paid by him. Balk sued Harris in North Carolina to recover the debt, and the latter pleaded the Maryland judgment in bar, was defeated in the trial court, and the judgment was affirmed in the state court on appeal, but was reversed by the United States Supreme Court. To comprehend the decision it is essential to refer to the Maryland statute permitting the writ of attachment. Section 10, art. 9, of the Code of Public General Laws of the state of Maryland, in designating the kind of property capable of being impounded by writ of attachment, provides:

"Any kind of property or credits belonging to the defendant, in the plaintiff's own hands, or in the hands of any one else, may be attached; and credits may be attached which shall not then be due."

The court, in commenting upon this in *Harris v. Balk*, 198 U. S. 215, 25 Sup. Ct. 625, 49 L. Ed. 1023, say at page 224 of 198 U. S., page 627 of 25 Sup. Ct. (49 L. Ed. 1023):

"Where money or credits are attached, the inchoate lien attaches to the fund or credits when the attachment is laid in the hands of the garnishee, and the judgment condemning the amount in his hands becomes a personal judgment against him. *Bushman v. Hanna*, 72 Md. 1, 5, 6, 18 Atl. 962. Section 35 of the same Maryland Code provides, also, that this judgment of condemnation against the garnishee, or payment by him of such judgment, is pleadable in bar to an action brought against him by the defendant in the attachment suit for or concerning the property or credits so condemned."

The foundation of the decision is therefore that by the Maryland statute jurisdiction was acquired of the debt due from Harris to Balk. By the statute itself the res followed the debtor. For the purpose of showing the paramount necessity of the local court possessing power to garnish the debt, this significant language is used at page 222:

"Attachment is the creature of the local law; that is, unless there is a law of the state providing for and permitting

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the attachment, it cannot be levied there. If there be a law of the state providing for the attachment of the debt, then if the garnishee be found in that state, and process be personally served upon him therein, we think the court thereby acquires jurisdiction over him, and can garnish the debt due from him to the debtor of the plaintiff and condemn it, provided the garnishee could himself be sued by his creditor in that state."

If by subdivision 5, section 438, of the Code of Civil Procedure, which is the authority for the present order, specific personal property had been defined and a policy of life insurance included in the enumeration, jurisdiction would have been acquired and *Harris v. Balk* would have been germane. A credit is not subject to seizure by attachment in this state. As was said in *Nat. Broadway Bank v. Sampson*, *supra*, at page 225:

"The laws relating to attachments do not authorize a proceeding in this state to seize a credit owing to a resident of another state, where neither the creditor nor the debtor is a resident here."

The opinion in *Louisville & Nashville R. R. Co.*, *supra*, simply follows the decision in the *Harris Case*, although the court is particular to state that the attachment proceedings strictly conformed to the state statute.

It is suggested, also, in the prevailing opinion, that the record does not disclose that substituted service of the summons has been made upon the nonresident defendants in pursuance to the order. The motion to set aside the order was made on the papers upon which the order was granted. It was conceded on the argument in this court that service had been made in compliance with the order, and that the nonresident defendants were in default, and the counsel further stated that they desired a decision on the main proposition, as an appeal from the order was the least expensive and most expeditious mode of determining the question; and no claim is made in the brief of the respondent's counsel that

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the nonresident defendants are not in default. The appellant is not responsible for the presence of the nonresident defendants. The plaintiff is asserting a lien upon their property, and their presence is essential to the determination of the respective rights of the parties, and the plaintiff recognized this fact by obtaining the order for publication. The defendant owes the amount claimed in the complaint and is willing to pay, but does not wish to pay the same obligation twice. It assuredly does not follow that the plaintiff would be remediless if the present action is not maintainable. The situs of the debt is in New Jersey, and all the rights of the parties may be determined within that jurisdiction.

The order should be reversed.

ROBSON, J., concurs.

MILLS & GIBB v. JOHN H. STARIN ET AL.

SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT, MAY, 1907.

§§ 982, 983, 984.

Action—Venue—Residence of a party.

An action must be instituted in the county in which one of the parties thereto resides, under the authority of section 982-984 of the Code of Civil Procedure, and the place of the trial thereof cannot be changed for the convenience of witnesses.
(Decided May, 1907.)

Appeal from Special Term, New York County.

Defendants appeal from an order denying a motion to change the place of trial from the county of New York to the county of Montgomery. Reversed.

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Mr. George M. Albot, for appellants.

Mr. Eugene Lamb Richards, Jr. (Rutherford B. Meyer, on the brief), for respondent.

LAUGHLIN, J.—The action is brought to recover damages for breaches of contracts to sell and deliver goods, wares, and merchandise. The defendants in their answer admit the incorporation of the plaintiff, and that the defendants are copartners, but deny the other material allegations of the complaint, and allege that the contracts were made without their authority. The plaintiff is a foreign corporation, organized under the laws of the state of New Jersey. The defendants both reside in the county of Montgomery, and resided there at the time the action was commenced. The place of trial designated in the summons is the county of New York. Before serving their answer, the defendants duly demanded that the place of trial be changed to the proper county, namely, to the county of Montgomery. The plaintiff, in opposition to the motion, presented an affidavit showing that its sole place of business in the state of New York is in the county of New York; that the contracts upon which the action was based were made and were to be performed in the county of New York; that the defendant Starin has an office for the transaction of business and transacts business in the county of New York, and is a member of the rapid transit commission of the city of New York, and spends "practically all of his time in the county of New York." The affidavit also tends to show that the convenience of witnesses requires that the issues be tried in the county of New York, and sets forth the names of the witnesses whom the plaintiff proposes to call, and facts tending to show that they can give material testimony in its behalf. The defendants did not present any affidavit in answer to that presented by the plaintiff tending to show that the convenience of witnesses requires that the

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trial of the issues be had in the county of New York. It does not appear that the affidavit presented by the plaintiff was served upon the defendants, or that the plaintiff made a counter-motion to have the trial of the issues retain in the county of New York; nor does it appear that the defendants were afforded an opportunity to meet the plaintiff's affidavit, or that they have in any manner waived their right to have the motion to change the place of trial from the proper county to the county of New York for the convenience of witnesses heard in the county of Montgomery.

The plaintiff, being a foreign corporation and the action being one not specified in sections 982 or 983 of the Code of Civil Procedure, the proper place of trial is a county in which one of the defendants reside. Code Civ. Pro., section 984; *Shepard & Morse Lumber Co. v. Burleigh*, 27 App. Div. 99, 50 N. Y. Supp. 135. The permanent residence of the defendant Starin, in the county of Montgomery, is not affected by his business interests, official position, and temporary sojourn in the city of New York. *People v. Platt*, 117 N. Y. 166; *Washington v. Thomas*, 103 App. Div. 423, 92 N. Y. Supp. 994; section 1, c. 4, p. 3, Laws 1891, as amended by section 1, c. 472, p. 1103, Laws 1906. The defendants were therefore entitled, as matter of right, to have the place of trial changed to the county of Montgomery, and on the motion for an order to that effect the court was without authority to consider, at the instance of the plaintiff, the convenience of witnesses. *Sylvester v. Lewis*, 55 App. Div. 470, 67 N. Y. Supp. 176; *Harmon v. Van Ness*, 56 App. Div. 160, 67 N. Y. Supp. 561; *North Shore Industrial Co. v. Randall*, 108 App. Div. 232, 95 N. Y. Supp. 758; *Acker v. Leland*, 96 N. Y. 383; *Veeder v. Baker*, 83 N. Y. 156. The county of Montgomery being the proper place for the trial of the issues, the action should have been brought in that county, and, not having been so brought, should now be changed to that county. If the plaintiff had brought the action in the proper county, it

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would have been at liberty thereafter to have moved to change the place of trial to the county of New York for the convenience of witnesses, and after the place of trial is changed to the county of Montgomery the plaintiff will still be at liberty to move for that relief, and the defendants will then have an opportunity of meeting the motion in the judicial district in which the action should have been brought. *Gorman v. South Boston Iron Co.*, 32 Hun, 71; *Herbert v. Griffith*, 2 App. Div. 566, 37 N. Y. Supp. 1098; *Phillips v. Tietjen*, 108 App. Div. 11, 95 N. Y. Supp. 469; *Acker v. Leland*, *supra*; *Veeder v. Baker*, *supra*.

It follows that the order should be reversed, with \$10 costs and disbursements, and motion granted, with \$10 costs. All concur.

ADELINE ESTELLE SULLIVAN OAKES v. THE
STAR COMPANY.

SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT, MAY, 1908.

§ 872, RULE 82.

Discovery—Examination of parties.

To entitle a party to examine his adversary as a witness before trial, it is necessary to show, by the recitation of appropriate facts and circumstances, that the testimony sought to be elicited is material and necessary for the party making the application (Code Civil Procedure, section 872, Rule 82). This action is for libel, and the defendant seeks to show by plaintiff's own testimony as to specific acts that she is of unchaste character. Such testimony would be inadmissible upon the trial and consequently cannot be considered necessary or material.

(*Decided May*, 1907.)

Oakes v. The Star Company.

Appeal from Special Term, New York County.

From an order denying plaintiff's motion to vacate the order for her examination before trial, plaintiff appeals. Reversed and remanded.

Mr. Franklin Bien, for appellant.

Mr. Clarence J. Shearn, for respondent.

SCOTT, J.—While this court has somewhat relaxed the strict rules which have heretofore so operated as to greatly restrict the right of a party to examine his adversary as a witness before trial, it has not been our purpose to permit the disregard of the provision of law relative to the facts necessary to be shown in order to obtain an order for such examination, or to permit such an examination to be had when it is apparent that no useful purpose can be served. It is still necessary to show, by the recitation of appropriate facts and circumstances, that the testimony sought to be elicited is material, and necessary for the party making the application (Code Civ. Pro., section 872, subd. 4, rule 82), and it is incumbent upon the party seeking the examination to make this fact appear. The present action is for libel, and the defendant seeks to examine the plaintiff before trial for the purpose of showing by her own testimony as to specific acts that she is of unchaste character, and that her reputation for chastity is bad. The pleadings are not included in the moving papers, and we have therefore no means of knowing what the alleged libel was, or what the defense is, except that it is stated generally to be "general denial, privilege and partial defenses in mitigation and reduction of damages." It appears, therefore, that the defendant does not attempt to justify the alleged libel, whatever it may be, and the examination of plaintiff is not required to establish any fact necessary or material to justification. It is to be used, as clearly appears both from the papers on appeal and the de-

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fendant's brief, if at all, in mitigation or reduction of damages. What the defendant seeks to do, therefore, is to prove by the plaintiff as a witness for defendant, in mitigation or reduction of damages, that such plaintiff has been guilty of specific acts or instances of misconduct, seeking thereby to prove that her reputation for chastity is bad. Such testimony would be inadmissible upon the trial, and consequently cannot be considered necessary or material. *Cudlip v. N. Y. Evening Journal Pub. Co.*, 180 N. Y. 85.

The defendant seeks to sustain the order for examination because, as is contended, the plaintiff has affirmed her chastity and good reputation, which the defendant by denying has put in issue. As has been said, the pleadings are not certified as having been included in the motion papers, and are not before us. If the defendant thinks that anything in them could support the order, it was its duty to have laid them before the court. We are therefore left to rely upon the affidavit of defendant's secretary and counsel for information as to the allegations of the complaint. He says that the plaintiff avers that the defendant, "maliciously intending to injure this plaintiff in her good name, fame, and reputation," published a libel concerning her. This does not amount to an averment tendering an issue as to her chaste character and good reputation, and even if it did would not justify the present order. The authorities upon which defendant relies go only to the extent of saying that where a plaintiff unnecessarily alleges her good character and the defendant takes issue thereon, the plaintiff may offer testimony in support of her allegations. They do not hold that in such a case the defendant may prove specific instances of misconduct in support of its denial of good character. *Stafford v. Morning Journal Ass'n*, 142 N. Y. 598; *White v. Newcomb*, 25 App. Div. 397, 49 N. Y. Supp. 704.

If defendant desires to question the plaintiff's character and reputation for chastity, it can do so only in two ways: First, by cross-examination of the plaintiff herself if she

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should be used as a witness, and, in that case, such cross-examination may extend to any specific acts occurring before or after the publication down to the trial, as bearing upon her credibility as a witness as well as upon her character for injury to which damages are sought to be recovered; and, second, by calling witnesses as to the general reputation of the plaintiff at and prior to the time of the publication of the alleged libel. But witnesses may not be called to prove specific acts on the part of the plaintiff, occurring before or after the date of the publication, either to attack her credibility or her character. *Wuensch v. Morning Journal Ass'n*, 4 App. Div. 111-116, 38 N. Y. Supp. 605. The defendant seeks to examine plaintiff as its own witness, and, as it is clear that the testimony sought to be elicited could not be received upon the trial, unless brought out on cross-examination, it is apparent that the evidence cannot be said to be material. The inclusion, in the order denying the motion to vacate the order for examination, of a stay of the trial, and all proceedings on the part of plaintiff until she should submit to an examination, was wholly unauthorized. No motion for such a stay was before the court. Under certain circumstances it might be proper to issue such a stay until an examination should be had, but only upon a proper motion to that effect and for cause shown.

The order appealed from will be reversed, with \$10 costs and disbursements, and the motion to vacate the order for plaintiff's examination granted, with \$10 costs. All concur.

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LEONARD JACOB v. TOWN OF OYSTER BAY ET AL.

SUPREME COURT, APPELLATE DIVISION, SECOND
DEPARTMENT, MAY, 1907.

§ 987.

Venue—Place of trial.

It is provided by section 987 of the Code of Civil Procedure that the place of trial may be changed "where there is reason to believe that an impartial trial cannot be had in the proper county." It is not necessary to conclusively show, to authorize a change, that an impartial trial cannot be had in the proper county, but should be granted where it appears that practically a whole town is arrayed against one man on the question of ownership of valuable land by such person or the community, that the struggle for possession has been bitter and protracted, the affair notorious, the controversy has been a subject of public meeting, of more or less discussion, and of comment in the newspapers.

(*Decided May, 1907.*)

Appeal from Special Term.

Defendants appeal from an order denying a motion to change the place of trial. Reversed, and motion granted.

Mr. Charles F. Brown (Origen S. Seymour, on the brief), for appellants.

Mr. Halstead Scudder, for respondent.

JENKS, J.—The learned justice presiding at the Special Term, in the opinion handed down upon the denial of this motion, thought that the motion could be granted only when it is conclusively shown that an impartial trial could not be

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had in the proper county; whereas, the statute is that the place of trial may be changed "where there is reason to believe that an impartial trial cannot be had in the proper county." Code Civ. Pro., section 987, subd. 2. Hence the decision may have been upon a mistaken view of the law, prejudicial to the plaintiff.

The learned justice also wrote that a trial should be attempted in the proper county, plainly in order to show whether the conditions there were adverse to an impartial trial, inasmuch as he wrote that if there was a disagreement of the jury this application might be renewed. We do not take this view, for a jury drawn in that county might be so partial as to be unanimous against the plaintiff, and yet its verdict be unwarranted. In *People v. Webb*, 1 Hill, 179, the court, speaking of such proof, say:

"To make such an experiment essential would seem to be quite dangerous. It is the very thing which the law seeks to avoid, when it is seen that the party may, and probably will, be drawn into a trial by a jury who, under an influence of which they may themselves be hardly conscious, an influence which perhaps no human sagacity can detect, may pronounce a verdict against him, and conclude his rights forever."

This expression is cited in part with approval by the court in *People v. McLaughlin*, 150 N. Y. 365, 380. We are of opinion that a proper case is presented for a change of the place of trial. Practically a town is arrayed against one man in a contention whether the individual or the community owns a piece of valuable land. The struggle for the possession has been bitter and protracted. There have been various litigations. There has been physical violence. The affair is notorious, and the controversy has been a subject of public meeting, of more or less general discussion, and of comment and of agitation, both in the local press and in newspapers of a wide circulation, which includes the county. It seems to us that to grant this motion is to remove the trial

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to an atmosphere clear from possible contamination, and to afford presumably an equality between plaintiff and the defendants before a jury indifferent as to the personnel of the parties or the result of the verdict. Our conclusion in no way reflects upon the general character of the possible jurors of the county of venue, but we cannot shut our eyes to the fact that upon a matter of such public interest and widespread agitation, involving the direct ownership of valuable realty by an important community in the county, any jurors might have strong feelings or prejudices which unconsciously would sway their verdict.

For these reasons we think that the order must be reversed, with \$10 costs and disbursements, and the motion granted to change the place of trial to the county of Kings, with \$10 costs. All concur.

ALFRED H. AVERY ET AL. v. FREDERICK L. AVERY.

SUPREME COURT, APPELLATE DIVISION, THIRD
DEPARTMENT, MAY, 1907.

§§ 635, 1852.

Attachment—Action for money only.

A warrant of attachment cannot be issued under section 635 of the Code of Civil Procedure, which authorizes an attachment against property when the action is for money only, and is brought by the holder of a note to charge the real property of a deceased maker.

(*Decided May, 1907.*)

Appeal from Special Term, Fulton County.

From an order denying a motion to vacate a warrant of attachment, defendant appeals. Reversed, and motion to vacate granted.

Avery et al. v. Avery.

Mr. N. H. Anibal, for appellant.

Mr. H. D. Wright, for respondents.

SEWELL, J.—This is an action to charge the real estate of which Charles A. Avery died seised with an indebtedness due to the plaintiffs. The complaint alleges the making of a promissory note by Charles A. Avery; that the plaintiffs are the owners thereof; that \$4,671.48 and interest from July 1, 1902, is due; that the defendant is the sole heir at law and next of kin of the deceased, and as such is entitled to an undivided one-eighteenth of the real estate described in the complaint; that more than three years have elapsed since letters of administration were granted; and that the decedent's assets are not sufficient to pay the plaintiff's debt. From the facts set forth in the complaint and the affidavit upon which the attachment was granted, it is manifest that this is not an action for the recovery of money only, and therefore not one in which an attachment might issue under the provisions of section 635 of the Code of Civil Procedure. The action is, not to enforce, but to acquire, a lien upon the real property, which descended to the defendant, and to authorize its sale for the purpose of satisfying the debt. *Rogers v. Patterson*, 79 Hun, 483, 29 N. Y. Supp. 963.

It is an action in equity having the nature of a proceeding in rem in such sense that, when the land has not been aliened by the heir, the judgment must direct that the debt of the plaintiff be collected out of the real property. Code Civ. Pro., section 1852; *Hauselt v. Patterson*, 124 N. Y. 356. In *Wood v. Wood*, 26 Barb. 356, where the same relief was sought, the court said:

"The basis of the action is the debt which Jacob Wood, deceased, owed the plaintiff; but that is not the gist of it. It is not an action for the recovery of money only, although the ultimate object of it is to obtain money; * * * but it is

an equitable action to reach certain real estate which Jacob Wood, deceased, devised to the defendants, and to authorize its sale for the purpose of satisfying a debt that the deceased owed the plaintiff. It is strictly an action in rem; for no facts are set out in the complaint, and none were established on the trial, to support a claim against the defendants personally. In other words, it is an action for equitable relief, of which the Supreme Court had not jurisdiction prior to the enactment of the Code."

In Mortimer v. Chambers, 63 Hun, 335, 17 N. Y. Supp. 874, Judge Andrews, speaking of the case of Wood v. Wood, said:

"What is said by the learned judge about the nature of the action in that case applies to the case at bar. The complaint does not ask for personal judgment against the defendants, and the only relief prayed for is that the property described in the complaint shall be sold and the debts of the plaintiff paid out of the proceeds."

Since the amendment of the Code, in 1866, which restricts by its terms the cases in which attachments are allowable to actions arising on contract for the recovery of money only, it has been held that this provisional remedy could not be granted in equitable actions. Ebner v. Bradford, 3 Abb. Prac. (N. S.) 248; Van Wyck v. Bauer, 9 Abb. Prac. (N. S.) 142; Hankinson v. Page, 12 Civ. Pro. R. 288; Thorington v. Merrick, 101 N. Y. 5. I find no case holding that an attachment can be granted in an action, which seeks other relief, before there can be a judgment for money. It was not so held in Hamilton v. Penney, 29 Hun, 265, upon which the plaintiffs seemed to rely. The plaintiff there sought to recover the amount due upon a promissory note made by the defendant. Unlike the case at bar, a personal judgment was sought and could be entered therein. It is true that the plaintiff asked, in addition to the demand for judgment, that the mining stock given to

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secure the note be sold and the proceeds applied upon the judgment. Of that the court said:

"This averment is no part of the cause of action. It is just and fair that the defendants have the benefit of the collateral security. The rule of law in such cases gives the right to have the collateral applied upon the claim without the plaintiff's offer. It is not material whether the application of the collateral be made before judgment for the money amount due, or afterwards. The acknowledgment that the plaintiff holds collateral which he wishes to have sold to apply upon the judgment does not, therefore, make the claim other than a claim for money only."

That action was in form an action for the recovery of money only, and it appears that the plaintiff complied with the conditions imposed by section 636 of the Code, by furnishing an affidavit stating, among other things, that a cause of action existed in his favor against the defendant for the amount due on a promissory note of \$1,000 and interest, "which amount plaintiff is entitle to recover from defendant over and above all counter-claims known to plaintiff." I think that case was within the letter of the law relating to attachments, and quite consistent with the idea that an attachment is not allowable in this class of actions.

The order should be reversed, with \$10 costs and disbursements, and the motion to vacate attachment granted, with \$10 costs.

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PEOPLE v. AMASA LYON ET AL.

SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT, MAY, 1907.

§ 1781.

Corporation—Officers—Removal for misconduct.

Where the officers of a corporation issue stock of a corporation without the authority of the directors or without any consideration flowing to the corporation, they can be remove from office under the authority of section 1781 of the Code of Civil Procedure. (*Decided May, 1907.*)

Appeal from Special Term, New York County.

From an interlocutory judgment overruling a demurrer to the complaint, defendants appeal. Affirmed, with leave to withdraw demurrer and answer over.

Mr. Thaddeus D. Kenneson, for appellants.

Mr. W. E. Kisselburgh, Jr., for respondent.

SCOTT, J.—In this action by the Attorney General for the removal of the defendants as directors of the Zeltner Brewing Company, the defendants have demurred to the complaint for general insufficiency, and now appeal from an interlocutory judgment overruling their demurrer.

The complaint sets out with considerable detail a so-called syndicate agreement between the defendants and one DeWitt C. Flanagan to acquire from a trustee in bankruptcy the assets of the Henry Zeltner Brewing Company; to organize the Zeltner Brewing Company to acquire these assets, issuing stock and bonds in payment therefor and the disposi-

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tion of the stock and bonds so to be issued. It alleges the carrying out of this agreement to a certain point, the election of the defendants, with others as directors of the new corporation, and the selection of Zeltner as vice-president and of Lyon as secretary and treasurer. It also alleged that by agreement between the defendants and said Flanagan the stock and bonds of the new company when issued were, as to part thereof, to be given to those who had advanced money for the purchase of the assets from the trustee in bankruptcy, and as to a part to the payment of other obligations, the balance to be issued solely for the benefit of the corporation in order to raise working capital.

The gravamen of the charge against these defendants is to be found in the eighth paragraph of the complaint, which alleges that the defendants, "without any authority from the board of directors or otherwise," issued stock certificates to certain persons, much in excess of the amounts previously agreed upon and, as is alleged, without consideration, and in violation of the by-laws, which required that certificates of stock should be signed by the president.

If it be true, as alleged in the complaint, that defendants issued stock of the corporation without authority of the board of directors, and without any consideration therefor flowing to the corporation, they certainly have been guilty of misconduct toward the corporation. Indeed no serious argument is made in their behalf that the facts alleged do not charge them with misconduct in their offices of vice-president and secretary, respectively; their claim being that they cannot be removed as directors for misconduct as officers. This, as we think, is too narrow a construction to be placed on section 1781 of the Code of Civil Procedure. That section authorizes an action to remove one or more trustees, directors, managers, or other officers of a corporation, upon proof or conviction of misconduct, and there is nothing in the statute to warrant the doctrine that a man who is at the same time a director and an executive officer of a corpora-

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tion may, notwithstanding grave misconduct in one capacity, still insist that he is entitled to remain in partial control of the company in his other capacity. It would be especially unreasonable to so construe the statute in a case like the present, since it is the directors who elect the officers, and if defendants were to be removed as officers, but retained as directors, they could in the latter capacity vote to re-elect themselves to the offices from which they have been removed.

The fact that after the alleged misconduct the defendants were re-elected directors does not serve to condone their fault, or to protect them from removal, as their tenure of office must be treated as continuous. The judgment appealed from is affirmed, with costs and disbursements, with leave to defendants to withdraw their demurrer and answer over within 20 days, upon payment of the costs in this court and the court below.

LAUGHLIN and CLARK, JJ., concur.

INGRAHAM, J. (dissenting).—This action is brought under section 1781 of the Code of Civil Procedure, which authorizes an action by the Attorney General on behalf of the people of the state against "one or more trustees, directors, managers, or other officers of a corporation, to procure a judgment. * * * (4) Removing a defendant from his office, upon proof or conviction of misconduct." To entitle the people to maintain such an action the complaint must allege that the officer sought to be removed was guilty of "misconduct" as a trustee, director, manager, or officer of the corporation, and whether or not this complaint alleges such misconduct as would justify the removal of the defendants as directors of the corporation is presented by the demurrer. The misconduct which would justify the removal of the defendants must be some violation by the defendants of their duty to the corporation, not

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a failure to carry out an oral agreement between the defendants and others as to the interest that the parties to such agreement were to receive in the stock of the corporation after it was issued. It certainly was never intended that this provision authorizing an action on behalf of the people was to be used to enforce oral agreements or obligations between individuals. The complaint alleges: That after this corporation was organized there was an oral agreement, which is called in the complaint a "syndicate agreement," which was to the effect that when the stock and bonds, the consideration of the transfer of certain property to the corporation, were issued to one Flanagan he would cause to be transferred to the defendant Lyon certain of such stock and bonds, to McLaughlin certain other of the said stock and bonds, and that Flanagan would retain for himself certain of the stock and bonds, and "would deposit with said company the balance of said stock and bonds to be applied to the following purposes and no other." \$104,000 of such deposited stock was to be issued to one Zeltner for certain considerations, and \$83,000 to the estate of one Henry Zeltner in full settlement of the claims of said estate, and \$50,000 thereof to one Woodward for legal services rendered to and for the benefit of said corporation. The balance of the said stock was to be issued solely for the benefit of the corporation. That it was further provided in said oral agreement that the balance of the bonds to be issued should be sold for the purpose of raising working capital for said corporation. That such sale should be for par, and that there should be given from said deposited stock, as a bonus to purchasers of said bonds, stock in said corporation at the rate of two to one. This oral agreement is alleged to have been entered into after the incorporation of the company and after the company had purchased the property from Flanagan. There is no allegation that the company was ever a party to this agreement; or that it was in any way liable for or entitled to the benefit of it. What-

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ever right the individuals had under the agreement could be enforced by an action between them; but with this agreement, so far as appears, this corporation had nothing to do. The complaint then alleges that thereafter there was issued to Flanagan certain of the stock of the said corporation of the par value of \$699,000 in part payment for the transfer of the property to the corporation, "whereupon, in fulfillment of such oral agreement, said Flanagan indorsed the said stock certificates to said Lyon, Zeltner, McLaughlin, and himself, and deposited the same in the office of said corporation on or about the 10th day of August, 1904, in order to enable said corporation to issue stock to proper parties, and in quantities provided for in said oral agreement." It is not alleged that any part of this stock was ever transferred to the company, or that the company had the right to enforce the oral agreement between the individuals, or that it ever became the owner of the stock, or in any way entitled to it. The misconduct alleged is, that after stock certificates had been indorsed by Flanagan to Lyon, Zeltner, McLaughlin, and himself, and deposited in the office of the company, the defendants, as the treasurer and vice-president of the company, issued new certificates of stock in place of that which had been transferred to these four persons to Zeltner, Lyon, and McLaughlin, without transferring any of the stock to Woodward, and without transferring any stock to the corporation to be disposed of so as to provide working capital for it.

I cannot see that this was misconduct as an officer or director of the corporation. The company was bound to transfer the stock to the persons to whom it had been assigned by Flanagan, and all that these officers of the company did was to transfer the stock to the persons to whom Flanagan had assigned it. If the company was entitled to have a portion of this stock returned to its treasury by the persons to whom Flanagan had transferred it, it could enforce such right by an action in its name against the persons to whom

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the stock had been transferred by Flanagan. The mere fact that the defendants, as officers of the company, had actually transferred the stock to Flanagan's assignees was not misconduct by the officers, for they were doing what they were bound to do. When the stock was issued to Flanagan for the purchase of the property, he became the owner of the stock, and, the corporation was bound to transfer it to such persons as Flanagan should assign it to, and for the officers to perform this legal duty was not misconduct as officers of the company. It is alleged that the by-laws of the corporation required the stock and bonds of the corporation to be signed by the president thereof, and that one of these defendants had signed the certificates as vice-president. It would seem that Flanagan was president, Zeltner vice-president, and Lyon secretary and treasurer, and for the vice-president to act in signing certificates of stock which the corporation was bound to issue would not be misconduct. I can see no misconduct alleged against these defendants as officers or directors of the company, and, therefore, nothing to justify a judgment removing them as directors.

I think, therefore, that the demurrer should be sustained.

PATTERSON, P. J., concurs.

Mullin et al. v. Mullin et al.

MARY E. MULLIN ET AL. v. BRIDGET MULLIN
ET AL.

SUPREME COURT, APPELLATE DIVISION, SECOND
DEPARTMENT, MAY, 1907.

§ 446.

Undue influence—Constructive trust—Parties to an action.

Where defendant used undue influence on a person having money to pay same over to defendant, to hold part of the money in trust and to invest part in real estate, the defendant in such case is considered as a trustee and can be made to account for such funds.

Same.—Same.

In an action to recover said funds, after the death of the one from whom the funds were taken, no one can be made party plaintiff under section 446 of the Code of Civil Procedure, except the personal representative of decedent.

(*Decided May, 1907.*)

Appeal from Special Term, Queens County.

Defendants appeal from an interlocutory judgment overruling demurrers to the complaint. Modified and affirmed.

Mr. Leander B. Faber and *Charles H. Street*, for appellants.

Mr. Rudolph Marks, for respondents.

MILLER, J.—The defendants appeal from an interlocutory judgment overruling their demurrers to the complaint. The complaint attempts to plead two causes of action, and the defendants demur to the entire complaint, on the ground that causes of action are improperly united, and to each separate cause of action attempted to be stated on the

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ground of misjoinder of parties plaintiff and of failure to state facts sufficient to constitute a cause of action. The plaintiff Mary E. Mullin, who sues individually and as administratrix, is the widow of John P. Mullin, deceased, and the plaintiff Mollie Oldner is the only heir at law and next of kin of said deceased. While the complaint lacks clearness and precision, I think that, indulging in the inferences warranted in testing its sufficiency on a demurrer, it alleges in effect, for the first cause of action, that the defendants by the exercise of undue influence over said John P. Mullin from time to time induced him to deliver to them large sums of money to be held by them in trust, and that they also by like means from time to time induced him to invest portions of said moneys in real estate, taking the title in the name of the defendant Bridget Mullin under an agreement that she would hold it in trust for him, and that during his lifetime he was in absolute possession and control of said real property; that the plaintiffs are in ignorance of the exact sums of money so delivered and of the particular parcels of real property so purchased; that after the death of the said John P. Mullin the said defendant, Bridget Mullin, conveyed said real property to the defendant Mary Nolan; and that the said defendants refuse to account in any way or recognize the rights of the plaintiffs in said property. It is also alleged that one of the purposes of the said Mullin was to avoid the payment of liabilities which might accrue against him.

Of course, it is unnecessary to discuss the proposition that a person who transfers his property to defraud his creditors cannot have the aid of equity to get it back, and that allegation would be fatal to the complaint were it not for the allegation that said Mullin was of feeble mind and under the influence and control of the defendants, and that the transactions alleged were the result of such undue influence and control. The unlawful purpose was therefore that of the defendants, and not of said Mullin. By the

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transaction alleged in the complaint the defendants became at least trustees *ex maleficio* of the moneys intrusted to their keeping. Equity will therefore compel them to account, but it is clear that, as to the money obtained by the defendants, no one but the personal representative of the deceased has any such legal or equitable interest in the subject of the action as entitles him to be joined as a party plaintiff within section 446 of the Code of Civil Procedure (*Havana City Railway Co. v. Ceballos*, 49 App. Div. 263, 63 N. Y. Supp. 417), and, as to the real property, equity, treating the entire transaction as void by reason of the undue influence practiced, might construct a trust and compel the defendants to account to the personal representatives of the deceased as trustees *ex maleficio* of the money used in its purchase. It is claimed by the respondents that the deceased was seised of an estate of inheritance in said real property, and that, therefore, the widow is entitled to dower by virtue of section 170 of the real property law (*Laws 1896*, p. 584, c. 547), and, while the appellants contend that the widow was not entitled to dower, they seem to assume that the heir is a proper person to maintain the action so far as it concerns the real property. If that assumption is correct, it must follow that the deceased was seised of an estate of inheritance and that the widow is entitled to dower; and a possible theory can be suggested for claiming that the absolute title vested in the deceased upon the conveyance to the defendant Bridget Mullin, pursuant to an agreement to hold the title in trust, which we are not to assume was void for not being in writing. While no trust could result from the payment of the purchase money, the conveyance pursuant to said agreement would operate to vest the legal title in the person entitled to the possession and the rents and profits, pursuant to sections 72 and 73 of the real property law (*Laws 1896*, p. 570, c. 547). The trust agreed upon being passive, no title vested in said defendant, but the said John P. Mullin became seised of the legal title.

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Wendt v. Walsh, 164 N. Y. 154. I suppose the party defrauded—*i. e.*, the one upon whom the undue influence was practiced—could elect whether he would avoid the entire transaction and hold the defendants as trustees *ex maleficio*, or whether he would affirm it, and insist that the legal title to the real property purchased had vested in him. If this be so, the commencement of an action by his personal representative, next of kin and heir at law, in which the claim of title is asserted, must be treated as an election of their part so to claim; and it is unnecessary now to determine who would have the right of election, as all of the parties who could possibly exercise it are plaintiffs. It will thus be seen that upon the theory of the complaint the widow and the heir are concerned in the real property, and the personal representative in the personal property, and it remains to be considered whether more than one cause of action is alleged, and if so, whether all of the parties are affected. While different transactions are alleged, they appear at least inferentially to be parts of the same general scheme. It is claimed that pursuant to agreement, and as the result of the exercise of undue influence, the defendants hold certain moneys as trustees, for which they must account to the personal representative; that they also have the record title to certain real estate purchased with a portion of said trust moneys, the fee of which pursuant to statute is vested in the heir of the cestui que trust subject to his widow's dower; and that the plaintiffs need a discovery and an accounting to ascertain the precise sums of money so obtained by the defendants and the precise portion thereof invested in real estate. While it is true that different persons are interested in each species of property, it does not necessarily follow that they are not interested in the subject of the action and in obtaining the judgment demanded. See section 446 of the Code of Civil Procedure.

It is evident that the question to be litigated is whether said money and real property were obtained by the defend-

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ants by means of undue influence exerted over said John P. Mullin and pursuant to an agreement to hold it in trust. In this question the parties are all equally interested. The main object of the action is for a discovery and accounting. In this the plaintiffs are equally interested. The fact that their pecuniary interest may not be the same, or that some may not be interested in the incidental relief obtained by others, does not prevent all being interested in the subject of the action and in obtaining the judgment demanded. *Simar v. Canaday*, 53 N. Y. 298. As incidental to the general purpose of the suit, if the plaintiffs are successful, the court may order the defendants to pay over to the personal representative of the deceased whatever sums of money are found upon the accounting to be in their hands, and it may likewise clear up the record title to the real property which it is claimed is vested in the heir subject to the widow's dower, but this relief is only incidental to the main purpose of the suit, and will be granted because equity will see to it that there is a complete determination in this suit of all of the matters of difference between the parties in any way involved in the controversy. If said Mullin were alive, he could certainly obtain a complete determination in one suit of all the matters alleged, and the language of Judge Gray, speaking for the court in *Shepard v. Manhattan Railway Co.*, 117 N. Y. 442-450, is quite applicable to this case:

"If this intestate had been living, he could only have maintained one action, and neither the authorities nor principle suggest a reason why, upon his death, those upon whom his property interests have thereby devolved, and who, in their combined personalities, represent him, and who have a common interest in holding the defendants liable for their acts, should be obliged to bring separate suits."

I think the case of *Bradley v. Bradley*, 165 N. Y. 183, furnishes ample authority for joining the plaintiffs in this

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case. In addition to the authorities cited by Judge Landon in that case, I also cite *Mahler v. Schmidt*, 43 Hun, 512, as particularly applicable to this case.

If I am right in asserting that upon the facts alleged in the complaint the said Mullin could have elected to hold the defendants as trustees *ex maleficio* of the moneys used in the purchase of the real property or to claim the absolute title to said real property, there is good reason why the personal representative, the widow, and the heir should all be parties to the action, and I think that, treating the complaint with liberality, as I have, it is found to allege a state of facts showing that the plaintiffs are all interested in the central point likely to be in controversy and in the judgment asked for, and it follows, therefore, that the demurrer to the first cause of action was properly overruled.

By the second cause of action the pleader undoubtedly undertook to state a cause of action relating to the same real property referred to in the first cause of action. I quote the material allegation of this cause of action:

"That the said John P. Mullin, deceased, was on and before the 17th day of October, 1904, seised in fee simple and in lawful possession of certain real property hereinafter more particularly and specifically described, which the said deceased, purchased and paid for from time to time during his lifetime, but, for the purpose of avoiding the payment of liabilities which might accrue against him in business or otherwise, and being of feeble mind and under the influence of the defendants above named, was induced by said defendants to take the deeds for such real property in the name of the defendant Bridget Mullin."

The part quoted falls short of alleging undue influence, and the allegation that the transaction was for the purpose of avoiding the payment of liabilities presents an insuperable objection to the sufficiency of this part of the complaint as stating facts sufficient to constitute a cause of action in favor of any one.

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The interlocutory judgment should be modified to the extent of sustaining the demurrer to the second cause of action, and, as modified, affirmed, without costs. All concur.

GEORGE W. BAXTER v. JAMES R. CONNOR.

SUPREME COURT, APPELLATE DIVISION, SECOND
DEPARTMENT, MAY, 1907.

§ 66.

Attorney and client—Settlement—Lien.

Where the settlement of a case is effected by the parties thereto between themselves and without the knowledge of plaintiff's attorney, who was to receive one-half of the amount recovered, said attorney can have the satisfaction of the judgment set aside and execution issued against the defendants to the amount paid in the settlement of the case, the attorney having a lien upon his client's cause of action under section 66 of the Code of Civil Procedure.

(Decided May, 1907.)

Appeal from Westchester County Court.

Defendant appeals from an attorney's lien upon a judgment for plaintiff, setting aside a satisfaction of the judgment, and authorizing execution in favor of the attorney to enforce his lien. Affirmed.

Mr. Samuel F. Swinburne, for appellant.

Mr. Sydney A. Syme, for respondent.

HIRSCHBERG, P. J.—This action was brought in the County Court of Westchester county to recover for personal injuries claimed to have been sustained by the plaintiff in

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consequence of the defendant's negligence. A writtem agreement was executed by the plaintiff and his attorney prior to the commencement of the action, which provided, among other things, that the attorney was to receive as compensation for his services one-half, or 50 per cent., of all damages which may be recovered by action, compromise, or otherwise. The trial resulted in a verdict for the plaintiff in the sum of \$500, and, including the costs and disbursements, judgment was entered in his favor for the sum of \$624.78. The defendant appealed to the Appellate Division, and pending the appeal the parties privately settled the case; the defendant paying the plaintiff the sum of \$275 in cash and receiving a general relief, together with a certificate of satisfaction, by which the judgment has been canceled of record. When the case was reached for argument in the Appellate Division, the plaintiff's attorney learned for the first time of the private settlement, and on its disclosure an order was made dismissing the appeal. Thereafter the attorney made a motion in the County Court for an order setting aside and vacating the satisfaction of the judgment and authorizing the issuance of an execution thereon to the extent of his lien, to be determined by the court pursuant to the provisions of section 66 of the Code of Civil Procedure. A reference was ordered to take proof of the matters involved, and, on the coming in of the referee's report in favor of the attorney it was duly confirmed, and the order or judgment appealed from entered.

It is undisputed that the plaintiff is not financially responsible; that he has no claim or offset against the sum which may be due to his attorney; that the amount paid to him by the defendant on the settlement was immediately expended, no part having been paid to his attorney; and that the settlement was without the knowledge or consent of such attorney. The contention of the respondent on these facts is that the lien of the attorney is confined to the sum paid in settlement, and that the order appealed from should be modified by

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substituting one-half of that sum, namely, \$137.50, instead of the amount which the court below has found was due, namely, one-half of the judgment, viz., \$312.39.

The decision of the County Court was in all respects correct. It is expressly provided by section 66 of the Code of Civil Procedure that from the commencement of an action the attorney who appears for a party has a lien upon his client's cause of action, which attaches to a judgment, and which could not be affected by any settlement between the parties. In the case of *Fischer-Hansen v. Brooklyn Heights R. R. Co.*, 173 N. Y. 492, the history of the legislation on the subject of attorneys' liens was considered, and its development in the direction of affording greater security to attorneys was noted. The court said (page 498 of 173 N. Y.):

"When the cause of action is merged in a verdict, report, decision, or judgment, the lien attaches to that also, as well as to the proceeds thereof, so that it cannot be affected by a settlement made between the parties at any stage of the action. * * * The statute is remedial in character, and hence should be construed liberally in aid of the object sought by the Legislature, which was to furnish security to attorneys by giving them a lien upon the subject of the action. The common law gave them no lien until the entry of judgment, but the statute gives them one from the commencement of the action. If the claim is prosecuted to judgment, or to a decision upon which judgment may be entered, the lien reaches forward, and attaches to that also. When the claim is thus extinguished by merger in a higher security, the statute makes express provision for the transfer and continuance of the lien."

It is quite apparent that, if the contention of the respondent should prevail, the statute affords no adequate security to an attorney. There is no pretense in this case that the defendant is irresponsible, or that there was any likelihood that the judgment recovered against him would

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have been reversed upon appeal. If, after a judgment has been duly recovered for a substantial amount to be equally divided between attorney and client by lawful agreement, the party in whose favor it has been obtained is at liberty to negotiate with the judgment debtor, and to cancel the judgment for a nominal consideration, limiting his attorney to a fractional part of the nominal sum by way of compensation, it is difficult to see any beneficial object accomplished by the statute. The freedom of a plaintiff to compromise his claim and to settle with his adversary, notwithstanding the existence of an attorney's lien, has often been judicially declared, and many cases are cited by the learned counsel for the appellant. They have little or no application here, because none of them relates to a case of settlement privately effected after judgment. The decision of this court, however, in the case of *Serwer v. Serwer*, 91 App. Div. 538, 86 N. Y. Supp. 838, is of direct application, and I think is controlling in support of the order or judgment appealed from. In that case, as here, the plaintiff had retained an attorney upon an agreement for 50 per cent. of the amount to be recovered. Judgment was obtained in favor of the plaintiff for the sum of \$3,400. The plaintiff petitioned the court for leave to settle, showing that the judgment could not be collected; that the judgment debtor was financially irresponsible; that the plaintiff was destitute; and that the relatives of the judgment debtor had offered to pay the plaintiff \$500 in settlement, and \$100 per annum for five years thereafter. The Special Term granted the application, and ordered a reference to determine the amount which the attorney should receive from the sum to be paid in settlement. On appeal, we held that, even if the court had power, under any circumstances to reduce the amount of the attorney's compensation, the facts stated did not warrant the exercise of the power; and that the attorney was entitled to have the judgment held for the debt until his lien was discharged. Mr. Justice Jenks, writing for the unanimous

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court, said (page 541 of 91 App. Div., page 840 of 86 N. Y. Supp.):

"I am of opinion that, if the order of the Special Term be based upon the theory that it had the power in this case to reduce this agreed compensation of the attorney to some part of the said \$500, it cannot be sustained. * * * This attorney has a lien upon the judgment of \$3,400 for \$1,700. *Matter of Regan*, 167 N. Y. 338, 343. This lien, afforded by statute, as is said in *Fischer-Hansen's Case*, supra, 'reaches forward and attaches to' the judgment. The attorney has the right to have the judgment held for the debt until the lien is discharged. *Randall v. Van Wagenen*, 115 N. Y. 527, 531. * * * Through the lawful agreement of attorney and client, the statute affords security to the attorney by lien upon the judgment to the extent of \$1,700. The client would have the court not alone impair the security to the extent of at least \$1,200, but shift the lien to the \$500, which is to be paid in satisfaction of the judgment and to the extinguishment of that kind of security. I do not think that this can lawfully be done in this case. I am not dealing with the question of the rights of the plaintiff over the judgment, but with the proposition that would thus impair, reduce, and change the lien of the attorney in this judgment. * * * It is to be remembered that we are not dealing with the settlement of a claim or a cause of action like unto that under consideration in *Fischer-Hansen's Case*, 173 N. Y. 499, but with a judgment. The claim, as was said in that case, is 'thus extinguished by merger in a higher security,' wherefor 'the statute makes express provision for the transfer and continuance of the lien,' and that the precise question is whether the client can by summary application to the court compel the attorney resisting to forego the lien which the statute secures to him perforce of the contract between him and his client."

The position of the client in the case cited is much stronger than in the case at bar. If in that case the court

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had no power to authorize the settlement and a transfer of the lien from the judgment to the amount received in settlement, clearly the court would not have had the power to do so in this instance. The judgment herein is presumably good and collectible, and if on open application to the court with notice to his attorney, the plaintiff could not have received judicial sanction for the settlement which he has made, because the court is without power to compel the transfer of the attorney's lien to a fractional part of the sum of \$275, it is difficult to see how the settlement can be lawfully upheld with that effect, when it has been surreptitiously made behind the attorney's back.

The order should be affirmed.

Judgment and order of the County Court of Westchester county affirmed, with costs. All concur.

IN RE MARY T. DE FORREST'S WILL.

SUPREME COURT, APPELLATE DIVISION, THIRD DEPARTMENT, MAY, 1907.

§ 2722.

Executors—Claims against the estate—Evidence.

Upon the presentation of a claim against an estate, and in the verified answer of the executor it appears that the validity of said claim is doubtful, it was *held* as proper for the surrogate to dismiss said petition under the authority of section 2722 of the Code of Civil Procedure.

(*Decided May, 1907.*)

Appeal from Surrogate's Court, Rensselaer County.

Judicial proceedings in relation to the will of Mary T. De Forrest, deceased. Appeal by the executors from a decree

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directing them to pay certain claims of Mary De Forrest, individually and as guardian of Eleanor E. De Forrest, an infant. Affirmed.

Mr. John H. Burke (John B. Holmes, of counsel), for appellants.

Mr. Charles H. Bridge (Arthur L. Andrews, of counsel), for respondent.

JOHN M. KELLOGG, J.—The executors contend that under the provisions of section 2722 of the Code of Civil Procedure the surrogate was required to dismiss the petition upon their answer. The petition alleged an agreement dated January 14, 1898, by which the testatrix, for a valuable consideration, agreed to pay \$45 per month to Mary M. De Forrest for her use, and the sum of \$20 per month for the use of her child, Eleanor E., the child to receive \$45 per month after she became 10 years of age; that she became 10 years of age January, 1905; that the testatrix died January 3, 1905, and up to her death had fulfilled the terms of the agreement and paid the sums agreed; that, while proceedings were pending before the surrogate for the probate of said will and the appointment of a temporary administrator, an agreement was made by which the executors were to continue said payments; that the will has been admitted to probate, the executors have qualified, and the payments have been continued by them down to July 3, 1906, since which time they have refused to pay. The verified answer denied, upon information and belief, that the agreement rested upon a valuable consideration, and alleged that it was made upon certain conditions to be kept by the said Mary M. De Forrest, without the performance of which it was expressly understood that there was to be no liability to make the monthly payments, and that the will directed payment of said monthly installments, stating that such

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provision was made for the purpose of carrying out said agreement; that, when the executors made the agreement to continue such payments after the testatrix's death, they believed the will to be valid, and had not seen the agreement, and were not conversant with its contents, and did not know that the same had been rendered inoperative, and that by reason of the said Mary M. De Forrest's violating certain conditions which were a condition precedent to such monthly payments, and that since the will was admitted to probate the petitioners had commenced an action seeking to have it adjudged that the will and codicil were void, for the reason that they were obtained by the fraud, coercion, and undue influence of the said executors, who are the residuary legatees; that said action is still pending; that since making the stipulation for the payment of said moneys the executors have examined the contract, and have learned that the said Mary M. De Forrest had violated certain conditions thereof, which were conditions precedent to the right to receive such monthly payments, and that the executors intend to dispute the claim—and denies upon information and belief that the same is a legal charge against the estate of the testatrix.

The will and codicil is made a part of the answer, and we may fairly assume that the conditions contained in it with reference to the payment of said monthly installments are the same conditions mentioned in the contract, which contract was under seal. The only conditions mentioned in the will are that the said Mary M. De Forrest was to live and remain unmarried. The petition is verified by her then name, and there is no allegation that she is married. We may therefore assume that she has remained unmarried. That she is alive is proved by these proceedings. It is difficult, therefore, to see how she has violated any condition in the agreement to be performed by her. The will and codicil which give this large estate to the two executors does not describe them as relatives, but as friends and as cashiers of certain

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banks. We may infer those are the only relations they held to the aged testatrix. The will and the probate proceedings are made part of the answer, and undoubtedly those proceedings show clearly the relationship of the petitioners to the testatrix, and the fact that they have brought an action to set aside the will as a fraud upon them, together with the records before the surrogate, was clearly sufficient to establish that they as heirs at law and next of kin were entitled to a part or all of this estate if the testatrix died intestate. The codicil, which does not refer at all to the petitioners, or to the agreement with them, provides that, if any person who might be interested in her estate as next of kin should contest the will, they should receive no benefits under it. The surrogate is left entirely in doubt as to what facts the executors have discovered tending to show that this agreement under which they had continued the payments for a long time has been violated by the petitioners. Perhaps they refer to the attempt by the petitioners to contest the will of the testatrix, and claim the forfeiture on that account mentioned in the codicil. But the forfeiture only purports to relate to benefits under the will, and could not affect payments under the contract.

The denial in the answer that the agreement was upon a valid consideration at first seems to have some force. But the subsequent allegation that the agreement was made upon conditions to be performed by the petitioners shows that the agreement was executory upon both sides, and therefore the promise of one party would be a sufficient consideration for the promise of the other, and the fact that the agreement was executed under seal imports a consideration, and is not overcome by a mere denial on information and belief after the executors had continued by agreement to make the payments mentioned in the agreement. There is an entire absence of statement of any fact tending to show that the executors have any reasonable defense to the claim of the petitioners. The surrogate was justified in treating the answer as evasive,

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and considering it as showing an earnest desire not to pay, rather than any facts justifying a defense to the action. Perhaps the refusal to make the monthly payments was considered one means of defending the action to set aside the will. Without a fuller statement of facts, when the will is attacked solely upon the ground that the executors themselves obtained it by fraud and undue influence, the surrogate could not well assume that the executors entertained a reasonable doubt about the validity of the will, and that they did not want to make the payments for fear that the will might be set aside. Furthermore, if the will were set aside, the payments would be fully protected, because the petitioners would then share largely in the estate as heirs at law, so that the executors and the estate itself were taking no risk by making the payments.

But it is alleged that the petition must be dismissed, as it does not appear that there is money applicable to the payment of the claim which may be applied without injuriously affecting the interests of others, as required by section 2722 above referred to. The surrogate holds a peculiar position with reference to estates administered through his office, and in a sense every step before him in the administration of an estate may be considered as one move in the one general proceeding for the administration of the estate; so that, when the surrogate is called upon to act in the administration of an estate, the records of his office under his immediate charge are before him and cannot be entirely disregarded. We may assume that an inventory of this estate was present before the surrogate. The executors, with full knowledge of the condition of this estate, had agreed to, and from time to time continued, the payments upon this claim, and when they discontinued them it was not upon the ground of want of funds, but another reason is stated. After having made such payments and treated the estate as sufficient for such payments, the surrogate was authorized to assume that the objections raised in the

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answer were the only objections relied upon by the executors, and that the funds of the estate were sufficient, so that these payments might be continued as formerly without prejudice to the rights of any one. The surrogate was right in treating the answer as not showing or foreshadowing any defense to the plaintiff's claim, but as seeking merely to set up technical allegations by which the payments upon a just claim could be delayed, perhaps, to assist the executors in defending the action based upon allegations of their wrong.

The decree should be affirmed, with costs. All concur.

FT. MILLER PULP & PAPER CO. v. FRED. A.
BRATT ET AL.

SUPREME COURT, APPELLATE DIVISION, THIRD
DEPARTMENT, MAY, 1907.

§ 505.

Executor—Counter-claim—Action against decedent.

Under the authority of section 505 of the Code of Civil Procedure it is proper for an executor when sued to set up as a counter-claim anything which the decedent could have set up in an action against him.

(Decided May, 1907.)

Appeal from Special Term.

Foreclosure proceedings. From an interlocutory judgment which sustained the demurrer to the answers of the executors and overruled the demurrer to the answers of the other defendants, but limited the effect and application of their answers, all the defendants and the plaintiff appeal.

Interlocutory judgment sustaining the demurrer to the answers of the executors reversed, and demurrer overruled.

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Interlocutory judgment as to the other defendants modified, and, as so modified, affirmed.

Mr. William E. Bennett (Edgar T. Brackett of counsel),
for plaintiff.

Messrs. Bratt & Van Wormer and Alfred Pagelow, for
defendants.

JOHN M. KELLOGG, J.—In addition to the ordinary allegations in foreclosure, the complaint alleges that before the death of the mortgagor the superintendent of public works duly instituted proceedings under chapter 147, p. 332, of the Laws of 1903, for the condemnation of a part of the mortgaged premises, that the necessary maps and surveys were filed and served, and that the state engineer, pursuant to such proceedings, had entered and taken possession of the lands, and that the state had permanently appropriated the same, but that adjustment had not been made for the value of the lands taken, and that the remaining lands were not sufficient in value to pay the mortgage debt, and the plaintiff seeks to obtain the moneys due from the state for the lands so appropriated. Among other defenses, the executors of the mortgagor and the other defendants, who allege that they have a beneficial interest in the estate of the mortgagor, set up a defense, and by way of set-off and counter-claim, that long prior to the death of the mortgagor, and down to the time of the commencement of the action, the plaintiff wrongfully and unlawfully raised and maintained a dam for the storage of waters for its benefit, and caused the waters to overflow the mortgaged premises, injuring and destroying the crops thereon for many years, and that by reason of such overflow the mortgaged premises were reduced in value, and became less valuable and available as security for the bond and mortgage to the extent of \$4,000, which sum they seek to recover as a counter-claim.

The trial court sustained the demurrer to this answer of the executors upon the ground that to allow them to counter-claim their damages to the land in this action would be an injustice to other creditors, if any, and overruled the demurrer to the answers of the other defendants, holding that this answer alleged a proper counter-claim, but that no damages which occurred to the premises prior to the death of the mortgagor could be allowed. It is the duty of executors to preserve the estate and to defend it against unjust claims, and when a mortgagee seeks to take from the estate its property, which would be a valid asset for the payment of its debts, if any, it is the duty of the representative to defend the title of the estate to said property and to urge any counter-claim existing against the mortgage which was available to the decedent in his lifetime. This would not necessarily cause any unjust preference of creditors, for the reason that, if the real estate is saved from the foreclosure, it is available to the creditors if any. The right of the executors to avail themselves of any counter-claim existing in favor of the testator is recognized by section 505 of the Code of Civil Procedure. In this case the complaint tends to show that certain of the mortgaged property has been taken by the state, and the value of the land taken has not yet been paid, and it seeks to recover the money for such land. It is clearly the duty of the executors to contest the right to such money by setting up any counter-claim which their decedent had against the mortgage. The court, upon trial, has power to recognize and protect, so far as necessary, the equities of all persons interested in the estate. Plaintiff seeks to convert a fund which is held as security for the mortgage debt into money, and to apply it in payment of the debt. The defendant alleges that this fund has been depleted and depreciated by the wrongful act of the plaintiff in such a way that it is inadequate for the payment of the mortgage debt, and that the plaintiff has committed a permanent injury to the fund to the extent of \$4,000, which is

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approximately the amount claimed upon the mortgage, and that the plaintiff is continuing these wrongful acts down to the very time when it brings the defendants into a court of equity, and seeks to deprive them of the full title to the property, the substantial value of which it is alleged it has already wrongfully destroyed. The matters alleged in the answer, if true, are available to diminish or defeat the plaintiff's claim, and are connected with the subject of the action. The question before the court was the sufficiency of the answer. In determining that question the court is not called upon to qualify or limit the defendants' proof or define the extent of the counter-claim. These are matters that can more properly be dealt with by the trial court. The terms of the will, and just what title or interest, if any, the executors, or the persons beneficially interested in the estate, have in this real estate, is not before the court. The executors and the parties beneficially interested all uniting in the claim that the damages accruing in testator's lifetime shall be set off against the mortgage debt, the court is not justified in saying upon demurrer that such set-off cannot be allowed. As before stated, that is a question to be met upon the trial, as the facts and situation develop.

The interlocutory judgment sustaining the demurrer to the answer of the executors is reversed, with costs, and the demurrer is overruled, with costs, with the usual leave to the plaintiff to withdraw the demurrer and reply upon the payment of such costs. The interlocutory judgment as to the other defendants is modified by striking therefrom the following provision: "But the said counter-claim shall be available and is allowed to said defendants for only such damages as have arisen or been done to the lands or premises referred to in such counter-claim since the death of Robert Payne"—and, as so modified, such interlocutory judgment is affirmed, with costs to the appellants, with the usual leave to the plaintiff to withdraw the demurrer and reply upon the payment of such costs. All concur.

Ludwig Puls et al. v. New York, L. & W. R. Co.

LUDWIG PULS ET AL. v. NEW YORK, L. & W. R.
CO.

SUPREME COURT, SPECIAL TERM, ERIE COUNTY,
MAY, 1907.

§ 376.

Judgment—Entry thereof—Statute of Limitations.

Under section 376 of the Code of Civil Procedure, which provides that certain judgments are presumed to have been paid after 20 years, may be rebutted if in the moving papers of defendant it is shown that there had been no payment on the judgment. (*Decided May, 1907.*)

Motion to vacate judgment against defendant. Denied.

Mr. Chauncey J. Hamlin, for the motion.

Mr. F. F. Williams, opposed.

POUND, J.—The above action was begun in the Superior Court of Buffalo October 25, 1883, and tried January, 1885, by the court without a jury. The learned judge presiding at the trial handed down his decision December 31, 1886, in which he found that the plaintiff was entitled to recover of the defendant the sum of \$30 damages. On February 15, 1907, more than 20 years after the decision had been handed down, plaintiff's attorney filed same and entered judgment thereon in Erie county clerk's office for \$30 damages, \$36 interest, and \$124.64 costs, making in all the sum of \$190.64. Defendant moves to set aside and vacate this judgment for the reason that it was not entered until over 20 years from the date of the rendering of the decision.

Pettit v. Seligman.

The only question before the court is whether plaintiff was entitled to enter judgment. The presumption, if any, that the amount awarded to plaintiff by the decision herein has been paid, is rebuttable (*Matter of Looram*, 73 Hun, 177, 25 N. Y. Supp. 877), and is rebutted by defendant's moving papers, wherein it is set forth that nothing has been paid on said demand. The conclusive presumption arising under the 20 year statute of limitations (Code Civ. Pro., section 376) relates only to the remedy by action. *Kincaid v. Richardson*, 25 Hun, 237.

Motion denied, with \$10 costs.

ISABELLA M. PETTIT *v.* SOLOMON SELIGMAN.

SUPREME COURT, APPELLATE TERM, FIRST DEPARTMENT, MAY, 1907.

§ 523.

Pleadings—Verification thereof.

Under the Municipal Court Act, section 145, where a complaint is verified the answer must also be verified; and by the authority of section 523 of the Code of Civil Procedure, when a complaint is verified, all subsequent pleadings must be so where an answer to an amended complaint was verified at a time prior to the complaint, it was *held* to be properly disregarded.

(*Decided May*, 1907.)

Appeal from Municipal Court, Borough of Manhattan, Twelfth District.

Action by Isabella M. Pettit against Solomon Seligman. From a judgment for plaintiff, defendant appeals. Affirmed.

Mr. I. L. Broadwin, for appellant.

Pettit v. Seligman.

Mr. William B. Dressler, for respondent.

PER CURIAM.—The action is brought by the plaintiff to recover for rent. On October 15, 1906, defendant was served with a summons and complaint verified August 24, 1906. On the return day the defendant demurred to the plaintiff's complaint, on the ground that it did not state facts sufficient to constitute a cause of action. The demurrer was argued, and the court found in favor of the defendant, sustaining the demurrer. On November 8, 1906, plaintiff served on the defendant's attorney his amended complaint, verified the same day, November 8, 1906. In due time defendant filed in open court his answer, containing a general denial and a separate defense, which answer was verified October 17, 1906. Subsequently plaintiff made a motion to strike out the verified answer so interposed, on the ground that the answer is not an answer to the amended complaint, for the reason that the answer was verified October 17, 1906, prior to the date of the verification of the amended complaint. The motion to strike out the answer was granted, and judgment entered on the pleadings "in default of the verified answer."

Section 145 of the Municipal Court Act (Laws 1902, p. 1535, c. 580) requires a verified answer to a verified complaint. Section 523 of the Code of Civil Procedure provides that, where a pleading is verified, each subsequent pleading (with certain exceptions which do not apply to the question at issue here) must be verified; but it does not provide for any time when this verification shall be made. The defendant, at or before the time of demurring to the original complaint, apparently prepared also an answer to this complaint so that in the event of the original complaint being sustained he would have his answer ready. Upon an examination of the amended complaint, the defendant apparently found that his answer to the original complaint was appropriate as an answer to the amended complaint, and when

Pettit v. Seligman.

issue was to be joined on the 15th day of November the defendant filed in open court, as and for his answer to the amended complaint, the answer verified the 17th day of October, 1906, stating at that time that that was his answer to the amended complaint. The rules as to pleadings, when applied in the Municipal Court, are somewhat more lax than in higher courts, when the pleadings are oral; but the rules are as strictly applied when the pleadings are written. It seems to us that the answer submitted cannot be regarded as an answer to the amended complaint, and was properly disallowed by the court below, and that there was, therefore, a default on the part of the defendant. It purports to be an answer to a complaint which was stricken out of the case, and cannot be offered as an answer to an amended complaint which was not in existence at the time this answer was drawn and verified. If it could be regarded as a pleading subsequent to the amended complaint, it should have been verified subsequent to such amended complaint.

The judgment should be affirmed, with costs.

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